

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED SEP 20 1957

No. 13,835

Joseph W. Stewart
CLERK

MID-FLORIDA RADIO CORPORATION and
MID-FLORIDA TELEVISION CORPORATION,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

TELRAD, INC.,

Intervenor

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,835

MID-FLORIDA RADIO CORPORATION and
MID-FLORIDA TELEVISION CORPORATION,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

TELRAD, INC.

Intervenor

JOINT APPENDIX

(I)

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JOINT APPENDIX

4 [Received Aug 13, 1956]

FCC Form 301
February 1956Form Approved
Budget Bureau No. 52-R014.13

Section I

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSIONAPPLICATION FOR AUTHORITY TO CONSTRUCT A NEW BROADCAST
STATION OR MAKE CHANGES IN AN EXISTING BROADCAST STATION

* * * * *

1. Requested Facilities: Visual

Frequency	Channel No.	Power in kilowatts		Minimum hours operation daily
		Night	Day	
54-60 mc.	2	100	100	6

Hours of operation

Unlimited	Sharing with	Other
X	(Specify Stations)	(Specify)
Daytime only		
Limited		

Type of station (as Standard, FM, Television)

Television

Station location

City: Daytona Beach State: Florida

2. If authority to make changes in an existing station is requested

(a) Present facilities Visual

Frequency	Call	Channel No.	Power in kilowatts		Minimum hours operation daily
			Night	Day	
54-60 mc.	WESH-TV	2	5	5	6

Hours of operation

Unlimited	Sharing with	Other
X	(Specify Stations)	(Specify)
Daytime only		
Limited		

Station location

City: Daytona Beach

State: Florida

(b) If this application is for changes in an existing authorization, complete Section I and any other sections necessary to show all substantial changes in information filed with the Commission in prior applications or reports. In the spaces below check Sections submitted herewith and as to Sections not submitted herewith refer to the prior application or report containing the requested information in accordance with Instruction E. (If contemplated expenditures are less than \$5,000, complete paragraph 1 of Section III only. Section IV is not required for applications for minor changes not involving change in power, change in frequency, change in hours of operation, or moving from city to city.)

Section No. Para. No. Reference (File or Form No. and Date)

Section II See Sec. II with Ex. BTC-2175 2/20/56

X Section III

Section IV See Sec. IV with Ex. BTC-2175 2/20/56, also reverse
hereof

X Section V

Have there been any substantial changes Yes _____ No X
in the information incorporated in this
application by reference in this paragraph?

* * * * *

INSTRUCTIONS

* * * * *

E. Information called for by this application which is already on file with the Commission (except that called for in Section V-G) need not be refiled in this application provided (1) the information is now on file in another application or FCC Form filed by or on behalf of this applicant; (2) the information is identified fully by reference to the file number (if any, the FCC form number, and the filing date of the application or other form containing the information and the page of paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incor-

porate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

* * * * *

- 4a No substantial change is proposed in the program service described for Station WESH-TV in Section IV of application BTC-2175 granted April 25, 1956. It will be applicant's plan by the improved technical facilities proposed hereinto bring the aforesaid proposed schedule of local and film originations to large areas of central Florida now without such service, and to increase the operating hours of the station with as much additional service from networks as may be available. The increase in facilities with a more centrally located transmitter near DeLand, as requested herein, will in applicant's opinion serve as a most important improvement in the program service rendered locally by Station WESH-TV by providing local and network service with a Grade A signal throughout all of Volusia County within which Daytona Beach is located. DeLand is the county seat of Volusia County and the location of John B. Stetson University, the largest university in East Central Florida. For the convenience of the county seat area or other persons appearing on local originations who are closer to the proposed transmitter than to the main studio in Daytona Beach, an auxiliary studio will be maintained at the transmitter.

* * * * *

8 [Received Aug 13, 1956]

EXHIBIT 1

Plan of Financing

Applicant has completed construction of Station WESH-TV and commencing May 29, 1956, has been operating in accordance with its outstanding construction permit. In order to provide an improved service to Daytona Beach and its home county -- Volusia County -- as well as the many other persons in East Central Florida who now must depend upon only a very limited amount of service from operating

television stations, applicant proposes herein to construct and operate improved facilities for Station WESH-TV.

* * * * *

16 [Received August 13, 1956]

Section V-C

Broadcast Application

FEDERAL COMMUNICATIONS COMMISSION

* * * * *

1. Purpose of authorization applied for: (Indicate by check mark)
(If application is for a new station or for any of the changes numbered B through D, complete all paragraphs of this form; if change E is of a character which will change coverage or increase the overall height of the antenna structure more than 20 feet, answer all paragraphs, otherwise complete only paragraphs 2 and 7 and the appropriate other paragraphs; for changes F through I, complete only paragraph 2 and the appropriate other paragraphs; for change J, complete only paragraphs 2, 5 and 16(b).

- | | |
|--|---|
| A. ☐ Construct a new station | F. ☐ Construct or change auxiliary antenna system |
| B. ☒ Change effective radiated power or antenna height above average terrain | G. ☒ Change transmitter |
| C. ☒ Change transmitter location | H. ☐ Install auxiliary or alternate main transmitter |
| D. ☐ Change frequency | I. ☐ Other changes (specify) |
| E. ☒ Change antenna system | J. ☐ Change studio location |

2. Facilities requested:

Frequency

54 - 60 mc.

Channel No. 2

Effective Radiated Power
(visual)

In dbk: 20

In kw: 100

Effective Radiated
Power (aural)

In dbk: 17.73

In kw: 60

Antenna height above
average terrain

940 feet

* * * * *

4. Transmitter location:

State: Florida

County: Volusia

City or town: Near DeLand

Street Address (or other identification)

1 mi. West of US Highway 17,
5-1/2 miles South of Deland

*

*

*

*

*

7. (a) Antenna structure:

Is the proposed construction in the immediate vicinity of any other radio station or will the proposed transmitting antenna be supported by the antenna structure of any other radio station? If "Yes", attach as Exhibit No. _____ complete engineering data showing details and effect upon other station.

Yes _____ No X

Will proposed structure be constructed on the top of a building? If "Yes", state height of building (distance from ground to base of proposed structure) in feet.

Yes _____ No X

Overall height in feet above ground. (Do not include the height of any obstruction lighting which may be required.)

995'

Overall height in feet above mean sea level. (Do not include the height of any obstruction lighting which may be required.)

1034'

Height of antenna radiation center in feet above mean sea level.

984 feet.

Geographical coordinates of antenna (to nearest second)

North latitude

28° 56' 25"

West longitude

82° 18' 33"

How were coordinates determined? Volusia County Map

Indicate by check mark the zone in which structure is located.

1 _____ 2 X 3 _____

*

*

*

*

*

19 Broadcast Application

Section V-G (Antenna)

FEDERAL COMMUNICATIONS COMMISSION

* * * * *

1. Location of antenna:

State: Florida County: Volusia City or Town: Near DeLand

Exact antenna location (street address) (If outside city limits, give distance and direction from, and name of nearest town)

1 mi. west of US Highway 17, 5-1/2 mis. south of DeLand

Geographic coordinates (to be determined to nearest second. For directional antenna give coordinates of center of array.) For single vertical radiator give tower location.

North latitude

28° 56' 25"

West longitude

81° 18' 33"

Purpose of application (Check appropriate box)

a. New antenna construction

X

b. Alteration of existing antenna structures

c. Change in location

* * * * *

22 [Received Aug 13, 1956]

ENGINEERING REPORT

* * * * *

The new site is located 1 mile west of U. S. Highway 17, 5-1/2 miles south of DeLand, Florida. This site was selected after many conferences with aeronautical interests and is the only acceptable location that a 1000 foot antenna system can be erected and provide the required city grade service to Daytona Beach, Florida.

* * * * *

45 [Received Mar 8, 1957]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of	)	
	)	
TELRAD, INC. (WESH-TV)	)	
DAYTONA BEACH, FLORIDA	)	
	)	
For Modification of Construction	)	File No. BMPCT-4150
Permit to Move Transmitter	)	
(Channel 2) in Direction of Orlando,	)	
Increase ERP from 1.26 KW to 100 KW	)	
Visual and from .759 KW to 60.3 KW	)	
Aural, and Increase Antenna Height	)	
from 320 to 940 Feet.	)	
Granted February 6, 1957.		

JOINT PROTEST
AND
PETITION FOR RECONSIDERATION

ORLANDO BROADCASTING COMPANY, Licensee of Radio Broadcast Stations WDBO and WDBO-FM and Television Broadcast Station WDBO-TV, Orlando, Florida, MID-FLORIDA RADIO CORPORATION, Licensee of Radio Broadcast Station WLOF, Orlando, Florida, CENTRAL FLORIDA BROADCASTING COMPANY, Licensee of Radio Broadcast Stations WKIS and WKIS-FM, Orlando, Florida, and MID-FLORIDA TELEVISION CORPORATION and WORZ, INC., competing applicants for a new television broadcast station to be operated on Channel 9, in Orlando, Florida, pursuant to Section 309(c) of the Communications Act of 1934, as amended, protest the action of the Federal Communications Commission (hereinafter sometimes called "Commission") of February 6, 1957, granting the application of Telrad, Inc, (BMPCT-4150) for authority to change the transmitter location of television broadcast Station WESH-TV and to make other changes in its operating facilities and, pursuant to Section 405 of the Communications Act of 1934, as amended, request that the Commission reconsider and set aside said action. In support thereof, they state:

STANDING

1. Orlando Broadcasting Company is the Licensee of Television Station WDBO-TV (hereinafter sometimes referred to as "WDBO-TV"). This station has been in commercial operation since June 10, 1954. Over \$530,000. is invested in the operation of this station. WDBO-TV receives its revenue from network programs and from national, regional and local advertisers. Among the network programs it now carries, which provide it with revenue, are programs of the National Broadcasting Company (NBC). The NBC programs provide, on the average, revenue of over \$8,500. per month. Pursuant to the authorization provided for in BMPCT-4150, Station WESH-TV will compete with Station WDBO-TV in the Orlando market for network, national, regional and local advertising, and for talent and other program sources. Further, there will be competition for audience upon which advertising rates are based. The inescapable effect of the operation of WESH-TV in accordance with BMPCT-4150 will be to cause a loss to WDBO-TV of network revenue from the National Broadcasting Company and at least one other network and also a substantial loss of revenue from national, regional, and local advertisers; the two television stations would be in full competition with each other in the Orlando market.

2. Mid-Florida Television Corporation and WORZ, Inc. are competing applicants for a new television station to be operated on Channel 9 in Orlando, Florida. Both of these applicants have been heard and are awaiting final Commission decision. Both of these applicants have proposed a network affiliation with the National Broadcasting Company and both of them believe that the successful applicant for Channel 9 would, all other things being equal, receive the Orlando NBC television affiliation. As is demonstrated more fully below, if WESH-TV is permitted to operate pursuant to BMPCT-4150, and the Commission continues to withhold action on the pending applications of Mid-Florida Television Corporation and WORZ, Inc., the successful applicant will be foreclosed from an NBC affiliation for the Orlando market.

47 3. Orlando Broadcasting Company, Mid-Florida Radio Corporation, and Central Florida Broadcasting Company are licensees of and own and operate standard broadcast stations in the Orlando area. Orlando Broadcasting Company and Central Florida Broadcasting Company are also the licensees of FM broadcast stations in Orlando. The revenue of these broadcast stations is derived from national, regional and local advertisers. The effect of the operation of Station WESH-TV in the Orlando area as authorized by BMPCT-4150 will be to cause the loss of advertising revenue from national, regional and local advertisers who would now be attracted for the first time to the use of a new television station, WESH-TV, by reason of that Station's new transmitter location and identification with the Orlando market. These broadcast stations would be in competition with Station WESH-TV for the advertising dollar of national, regional and local advertisers.

THE MERITS

4. Under the Commission's Television Table of Assignments, two commercial VHF television channels are assigned to Orlando, Florida - Channels 6 and 9, and UHF Channels 18, 24 and 47 (24 is educational). There is an outstanding construction permit for Channel 18. Station WDBO-TV is in operation on Channel 6. Mid-Florida Television Corporation and WORZ, Inc. are competing applicants for Channel 9. The urbanized area of Orlando has a population of 73,163. There are six channels, four VHF (Channels 2, 4, 7 and 10 - Channel 2 is educational) and two UHF channels (23 and 33), allocated to Miami, the largest city in Florida, with an urbanized area population of 458,647. Stations are now in operation on Channels 2, 4, 7 and 23 in Miami. Jacksonville is allocated three VHF's (Channels 4, 7 and 12 - Channel 7 is educational) and two UHF's (Channels 30 and 36). Stations are in operation on Channels 4 and 36 in Jacksonville. The population of Jacksonville's urbanized area is 242,909. The St. Petersburg - Tampa area is allocated three VHF's (Channels 3, 18 and 13 - Channel 3 is educational) and one UHF (Channel 38). Stations are in operation on Channels 8, 13 and

48 Thereafter, WESH-TV abandoned its attempt to move its transmitter location towards Orlando.

7. On April 27, 1956, the Commission granted an application for transfer of control of Television Station WESH-TV (File No. BTC-2175). Pursuant to this authorization, the present owners of Station WESH-TV assumed control of Telrad, Inc. In that application, no mention was made of any proposal to resurrect the abandoned move of Station WESH-TV away from Daytona Beach, and towards the Orlando market. On the contrary, the application merely indicated that WESH-TV would continue to be a Daytona Beach station. Among other things, the Transferee stated that WESH-TV would program for the particular needs of Daytona Beach (See BTC-2175, Ex. 7). The Transferee also stated that it would attempt to secure a network affiliation if it would be available and stated it would prefer an affiliation with NBC and/or ABC.

8. As a Daytona Beach station, WESH-TV has thus far not become a network affiliate.

9. On August 17, 1956, Telrad, Inc. filed an application (BMPCT-4150) to change the transmitter location of WESH-TV to increase its effective radiated power and to make other equipment changes. The distance between Daytona Beach and Orlando given in the U.S. Coast and Goedetic Survey publication, Air-Line Distances Between Cities in The United States, Special Publication No. 238, is 51 miles between reference points specified for each city. The calculated distance from the reference point in Daytona Beach to the latitude and longitude specified in the instant application is 25.62 miles. And from that site to the reference point specified for Orlando, Florida, the distance is 27.53 miles. (See Engineering Affidavit attached hereto and made a part hereof.) Thus, Telrad proposes to locate Station WESH-TV in a south, southwest direction, halfway between Orlando and Daytona Beach, minus only 1.91 miles. The instant location is more than three and one-half miles farther from Daytona Beach than the distance specified in the Commission's McFarland Letter, Reference No. 8843. It is to be noted, further, that the elevation of the site is about the same height

49 above average terrain as the site now used by WESH-TV. No showing has been made that the nature of the terrain in the area makes it undesirable for WESH-TV to operate from its present site in Daytona Beach.

10. The instant application is almost identical in nature with the 1955 application which likewise proposed to re-locate Station WESH-TV and make it an Orlando station. There are no facts or allegations contained in the instant application which in anywise alter or answer the fundamental questions raised by the Commission in its McFarland Letter, Reference No. 8843 (August 31, 1955). The erroneous failure of the Commission to recognize the question of public interest involved and again propound the same questions and receive answers thereto has deprived these protestants of their statutory rights specified in Section 309. Not only has the Commission's presently erroneous action been inconsistent with its previous action in this matter, but its instant action is likewise contrary to its actions in similar matters relating to programming, station location and the requirement for a full and complete showing of the intentions of the applicant. (See McFarland Letter addressed to Storer Broadcasting Company in connection with re-location of Television Station WMUR-TV to a site closer to Boston, Massachusetts, than to Manchester, New Hampshire (File No. BPCT-2163). See also letter addressed to purchaser of WDEL, Inc. stock (File No. BPCT-1907) and answer of February 24, 1955, assuring Commission that transferee intends to maintain existing transmitter and studio locations and of his responsibility to the principal city of assignment - Wilmington, Delaware.) Not only have the statutory rights of these protestants been erroneously disregarded but, likewise, the rights of the pertinent numbers of the public have been erroneously subjugated and disregarded in the television service, programming, and advertising fields. The advertisers located in Daytona Beach will be required to use an Orlando station (WESH-TV) which will charge higher rates than a Daytona Beach station and whose programs would be designed to serve the larger city.

50

11. If WESH-TV is permitted to operate from the site proposed in BMPCT-4150 with the operating facilities specified in that application, WESH-TV will, in fact, be an Orlando market television station. It has the intention and will to identify itself for purposes of national, regional and local advertising as an Orlando station and will hold itself out to potential advertisers in this way. Further, it is the intention of WESH-TV to secure a regular television affiliation with the National Broadcasting Company and to serve as the Orlando television outlet for that network. Protestants aver, on information and belief, that Telrad, Inc. has been in the process of negotiating for such an affiliation, if it has not already received such an affiliation.

12. It is to be noted that the instant application does not make a disclosure of the intentions of WESH-TV to operate as an Orlando station. On the contrary, the Commission has been led to believe by the applicant that no substantial changes in programming will be involved as compared with the original application for transfer of control (BTC-2175), referred to above. The fact is that, whereas the plans in the original application (BTC-2175) contemplated the continuation of WESH-TV as a Daytona Beach television station with a possible presentation of some network programs of NBC or ABC, protestants aver, on information and belief, that the present plans of Telrad, Inc. are to secure a regular NBC television affiliation and to serve as the regular Orlando television outlet for NBC. Such plans and proposals have not been disclosed to the Commission in the instant application of Telrad, Inc.

13. The Commission recognized, in its allocations plan, that the needs and demands of the viewing public for television service in the Daytona Beach and the Orlando areas are separate, distinct, and not interrelated in anywise by providing television channels for each city. In the Census of Population: 1950, on Page XXXVII and Table 31, p. 1-78, Orlando and Daytona Beach are in separate economic sub-region areas. Other authorities, as well, (see Rand McNally, Hagstrom, J. Walter Thompson market areas) recognize the same distinction between the

51 two communities. The efforts of Telrad, therefore, to combine and consolidate these areas and cities by rendering a common television service to both violate not only the allocation table of the Commission and its Rules regarding same, but also, the concepts upon which they are founded.

14. (a) The action of the Commission in granting the Telrad application on February 6, 1957, is erroneous in law, and disregards and is contrary to the statutory standard of public interest, convenience and necessity by which it must be guided. This action violates not only Sections 1 and 307(b) of the Communications Act of 1934, as amended, but also the provisions of Sections 3.606 and 3.607 of its Rules and Regulations. It has heretofore been shown that this action is also in violation of the principles and concepts upon which the Commission's television plan is based. The service proposed by Telrad from the site proposed, as set forth in Figure 2 of the Engineering Statement attached to the application, disregards the interests of the viewing public located north of Daytona Beach along the coast and in the adjacent interior areas by failing to provide that area and population with a Grade A television service, which service should normally be rendered by a television station allocated to and operated in the Daytona Beach community. Since the Grade A contour of a maximum power station located in Daytona Beach will overlap the Grade A contour of WDBO-TV, any move of the Daytona Beach station to the south or southwest will increase such overlap. Likewise, such a move to the south would deprive viewers to the north and northwest of Daytona Beach of such Grade A service. The extent of the area which will not receive Grade A service from the Daytona Beach station located to the south or southwest will approximate that distance. Such a use of the existing television channels is in direct contravention of the fundamental requirements and concepts of Section 1 of the Communications Act of 1934, as amended. Furthermore, there is nothing in the instant application of Telrad, Inc., upon which the Commission could predicate a finding which would justify such a use of Channel 2, (See Engineering Affidavit Cohen attached

hereto) and in fact, the use of such channel would be contrary to the principles urged by the parent corporation and owners of Telrad, Inc.,
52 in Docket No. 11361.

(b) Section 307(b) of the Act is restrictive, as well as permissive, in requiring the Commission to consider a fair, efficient and equitable distribution of service, not at some future date, but at the time it takes action upon an application such as the instant Telrad application. At present, there is only one television station operating in Daytona Beach and one television station operating in Orlando. However, as heretofore recited, it can be reasonably expected that a television station will be authorized to operate on Channel 9 in Orlando in the near future. In addition, three UHF channels, including one educational channel, are allocated for use in Orlando. There is but one UHF channel allocated for use in Daytona Beach. Assuming, therefore, future utilization of all of these channels and the operation of Station WESH-TV, as proposed, the only opportunity the viewing public located in the natural tributary areas to the north and northwest of Daytona Beach will have to receive one Grade A television service will be from the UHF Daytona Beach station when, as and if it ever comes into operation. However, it must be located so as to accomplish this purpose, not as WESH-TV proposed to be located.

(c) The terms of Section 307(b) require consideration by the Commission of existing service to the public at the time it acts on an application, and not operation or service which may or may not exist at some indefinite time in the future. Furthermore, Section 307(b) contemplates the rendition of a first satisfactory service, rather than a degradation of that service, in order to create a second satisfactory service for people located in an area which already receives one satisfactory service. The Commission recognized this principle in the first allocation priority which was set forth and followed in its Sixth Report & Order. (See Engineering Affidavit, Cohen, attached hereto and made a part hereof.)

(d) Section 3.606 and the Table of Assignments thereunder specifies the frequencies that may be used in Orlando and Daytona Beach; and Section 3.607 delineates the distances from communities within which such channels may be used. It has already been demonstrated that the real purpose of Telrad in proposing to move Station WESH-TV to the site specified, is an effort to subvert these tables. Simply because Section 3.685 requires that a television station provide a 74 dbu signal over the principal community to be served, it may not be used to justify the nullification of the principles of the allocation table and Rules 3.606 and 3.607. If this interpretation of Section 3.685 is permitted in this instance, then Station WESH-TV, for all practical purposes, is an Orlando station, because it likewise puts this required minimum signal over practically all of the City of Orlando. Such a subterfuge may not be relied upon to vitiate the mandatory provisions of Section 307(b) of the Act.

15. In order that the applicable provisions of the Communications Act of 1934, as amended, and the Rules and Regulations of the Commission may be complied with, it is conclusive that Station WESH-TV should be located generally to the northwest of Daytona Beach, instead of to the southwest. These protestants therefore propose that Station WESH-TV be located to the northwest of Daytona Beach as set forth and specified in the attached engineering affidavit and made a part hereof, in lieu of the site specified by Telrad, Inc., herein. Protestants allege, and will prove in the requested evidentiary hearing, that the site proposed by them for the operation of Television Station WESH-TV will better serve the public interest, convenience and necessity than will the operation of that station at the site specified by Telrad, Inc., in its above-entitled application.

Conclusion and Requested Issues

THEREFORE, it is clear that protestants are parties in interest because they will suffer economic injury from the proposed operation; also that the Telrad proposed operation will not serve the public

interest in that Station WESH-TV as so operated would be essentially an Orlando-market station and its operation would be in violation, instead of in furtherance, of the Commission's rules and allocation policies.

Accordingly, protestants request the Commission to -

54 (1) Designate the above-entitled application of Telrad, Inc., for evidentiary hearing upon the following issues:

(a) To determine whether, in view of the circumstances of this case, the purpose of the proposed move of the transmitter location and the change in operating facilities of Station WESH-TV is to provide an additional television broadcast service to Orlando and its surrounding area in derogation of the Commission's allocation policies and rules, particularly Sections 3.606 and 3.607 thereof.

(b) To determine the programming plans of the applicant, especially in relation to the representations made to the Commission, and to determine whether there has been a full and frank disclosure thereof.

(c) To determine whether the grant of the instant application is consistent with and will further the objectives of the provisions of Section 307(b) of the Communications Act of 1934, as amended.

(d) To determine whether the applicant's proposed use of the channel assignment is consistent with and will further the objectives of Section 307(b) of the Communications Act of 1934, as amended.

(e) To determine whether the grant of the instant application is consistent with and will further the objectives of the provisions of Sections 3.606 and 3.607 of the Commission's Rules.

(f) To determine whether the applicant's proposed use of the channel assignment is consistent with and will further the objectives of the provisions of Sections 3.606 and 3.607 of the Commission's Rules.

(g) To determine whether the needs of those areas and populations in the Daytona Beach area currently without a Grade A service should be subverted to the needs of those that currently receive a Grade A signal from Station WDBO-TV and would receive a second Grade A signal if operation of Station WESH-TV should commence as Telrad has proposed.

(h) To determine whether the needs of the populations and areas to be served by the instant Telrad proposal are superior to the needs of those populations and areas which would receive service should operation of Television Broadcast Station WESH-TV commence as proposed by the protestants herein.

(i) To determine whether a full, complete, and candid disclosure has been made with regard to all of the facts and circumstances surrounding the filing and prosecution of the instant application with

particular reference to a network affiliation by the applicant and all representations made to the Commission concerning network affiliation, as well as the substance of all negotiations, agreements, and understandings with the networks regarding the utilization of the facilities proposed.

55 (j) To determine what effect the rendition of a Grade A television service to the City of Orlando and a principal city signal to a major portion thereof will have upon the program policies and programs to be broadcast by Station WESH-TV, if operated as proposed.

(k) To determine the effect which the proposed extended coverage will have upon the availability and usefulness of the applicant's facilities to the Daytona Beach public and its environs.

(l) To determine, in view of the foregoing, whether the grant of the instant application is consistent with the public interest, convenience and necessity.

(2) Adopt the foregoing issues, make the protestants parties to the proceeding, and place upon the applicant both the burden of proceeding with the introduction of evidence and the burden of proof.

(3) Postpone and stay the effective date of the Commission's action to the effective date of the Commission's final decision after the evidentiary hearing upon the above-entitled application for the reason that the instant authorization is not necessary to the maintenance and conduct of an existing service and that there is no basis for an affirmative finding that the public interest requires that the grant remain in effect. Furthermore, in order to correct the errors of law herein recited, the Commission must finally deny the instant application of Telrad, Inc. Continuation of the authorization erroneously and illegally granted without a stay, pending the final denial, could and would subject these protestants to irreparable damage for which there is no adequate remedy at law.

(4) Grant such other and further relief as the circumstance may warrant and the public interest may require.

Respectfully submitted,

ORLANDO BROADCASTING COMPANY, INC.

By /s/ Geo. O. Sutton

Its Attorney
National Press Building
Washington 4, D.C.

MID-FLORIDA RADIO CORP.
and
MID-FLORIDA TELEVISION CORP.

By /s/ Paul Dobin
Their Attorney
Cafritz Building
Washington 6, D.C.

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CENTRAL FLORIDA BROADCASTING COMPANY
and
WORZ, INC.

By /s/ Eliot C. Lovett
Their Attorney
734 Fifteenth Street, N. W.
Washington 5, D.C.

* * * * *

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GEORGE C. DAVIS

This engineering statement is prepared on behalf of the Orlando Broadcasting Company, Inc., licensee of Television Station WDBO-TV, Orlando, Florida in support of a joint protest and a petition for reconsideration of the grant of Telrad, Inc. (WESH-TV) Daytona Beach, Florida, File No. BMPCT-4150.

From airways studies of the area surrounding Daytona Beach and from informal conferences with CAA, it has been determined that the nearest location to Daytona Beach for tall tower operation of WESH-TV exists in an area southwest of Bunnell. This area is outlined on a portion of a sectional aeronautical chart for the Daytona Beach area. The site proposed by the protestants for WESH-TV (referred to hereinafter as the "Bunnell site") is spotted within this area on the same map, which is designated as Figure 1. The geographic coordinates for the "Bunnell site" are as follows:

North Latitude: 29 degrees 22 minutes 30 seconds

West Longitude: 81 degrees 18 minutes 15 seconds

Figure 2 attached hereto shows the Grade A and Grade B contours of WESH-TV for operation from the proposed site near Bunnell. The service contours are computed on the basis of an effective antenna

height of 945 feet and an effective radiated power of 100 KW. Due to the unvarying terrain generally prevailing over Florida, no profiles have been drawn and the contours are plotted as circles.

- 60 The map designated as Figure 3 shows the Grade A contour of WESH-TV from the site near Orange City as compared to the Grade A contour of WESH-TV from the protestants' proposed site near Bunnell. These Grade A contours are shown in relation to the Grade A contours of the existing stations, WDBO-TV, and WMBR-TV, and authorized station WFGA-TV.

The operating parameters of the stations shown on Figure 3 are as follows: WDBO-TV, Orlando, Florida, Channel 6, 100 KW ERP, 543 feet; WFGA-TV, Jacksonville, Florida, Channel 12, 316 KW ERP, 950 feet; WESH-TV, Daytona Beach, Florida, Channel 2, 100 KW ERP, 945 feet; WMBR-TV, Jacksonville, Florida, Channel 4, 100 KW ERP, 991 feet.

The population contained within the Grade A overlap area of WDBO-TV, Orlando, Florida, and the proposed operation of WESH-TV from "Orange City site" southwest of Deland, Florida, is 147,071 persons. The Grade A overlap area is 1522 square miles.

Using the "Bunnell site" it has been determined that the overlap of the Grade A contour of WESH-TV, using their proposed tower height and full power, with the WDBO-TV Grade A contour would contain 3,134 persons in an area of 153 square miles.

From the "Bunnell site" there exists an overlap of 328 square miles with the Grade A contour of the new Channel 12 station, WFGA-TV, in Jacksonville, Florida. The population within this Grade A overlap area is 14,053.

- 61 By employing the "Bunnell site", a Grade A service is provided to 23,795 persons not included within any other Grade A contour. This area is shown hatched on Figure 3. The area within this new Grade A service includes 885 square miles. It is 333 square miles greater and includes 7,541 more people than the unduplicated Grade A service from the "Orange City site" (shown shaded on Figure 3).

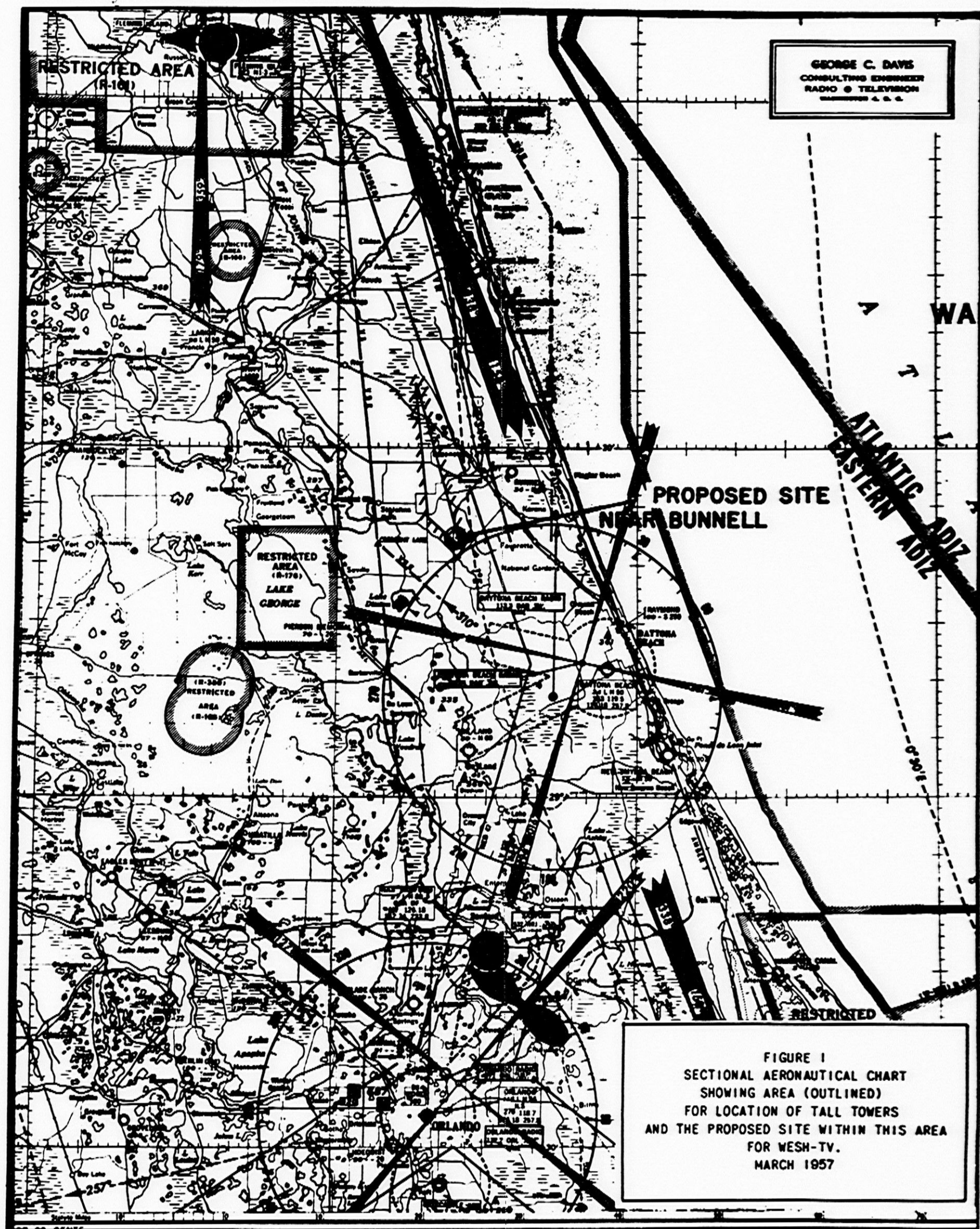
Population contained herein is based on the United States Census of 1950 with due attention to the distribution of population throughout minor civil divisions. The areas were measured with a polar planimeter.

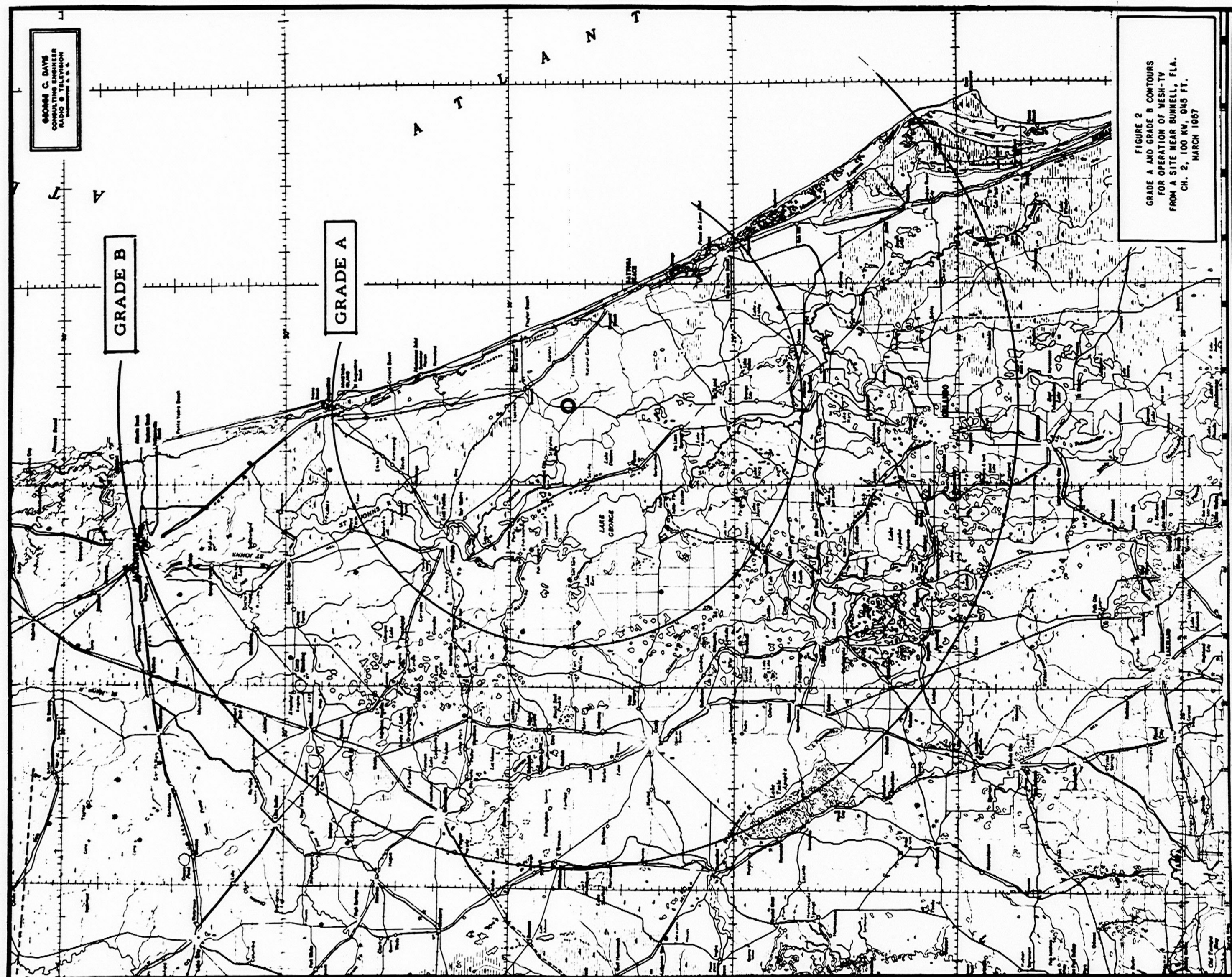
Station WESH-TV operating from the "Bunnell site", will deliver more than the minimum required city grade signal (74 dbu) to Daytona Beach. Furthermore, it will provide a stronger signal to this city than would the operation from the "Orange City site".

The "Bunnell site" will meet the minimum required mileage separation set forth in Section 3.610 of the Rules.

The distance between Daytona Beach and Orlando is 51 miles. This distance is taken from the United States Department of Commerce Special Publication Number 238 entitled "Air-Line Distances Between Cities in the United States".

Using the reference points for Daytona Beach and Orlando set forth in the above publication, the computed distance from the WESH-TV "Orange City site" to Orlando is 27.53 miles and from this site to Daytona Beach, it is 25.62 miles. These distances were computed by the method set forth in Section 3.611 of the Rules.





GEORGE C. DAVIS
CONSULTING ENGINEER
RADIO & TELEVISION
WASHINGTON, D. C.

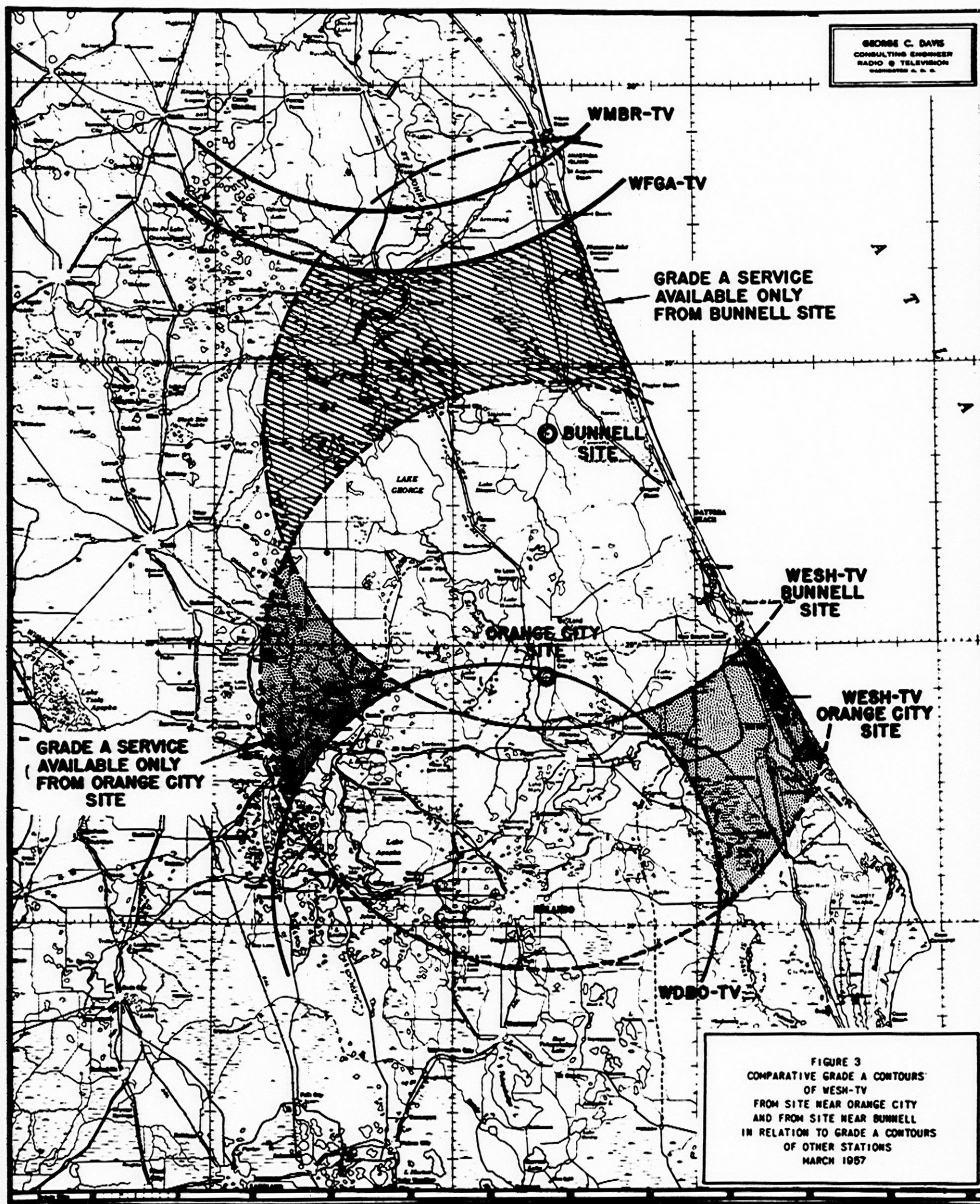


FIGURE 3
COMPARATIVE GRADE A CONTOURS
OF WESH-TV
FROM SITE NEAR ORANGE CITY
AND FROM SITE NEAR BUNNELL
IN RELATION TO GRADE A CONTOURS
OF OTHER STATIONS
MARCH 1957

70

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of)
)
Telrad, Inc. (WESH-TV),)
Daytona Beach, Florida)
)
For Authority to Construct new)
transmitting facilities)

File No. BMPCT-4150

[Received Mar 19, 1957]

OPPOSITION TO JOINT PROTEST
AND
PETITION FOR RECONSIDERATION

Comes now, TELRAD, INC., owner and operator of Station WESH-TV, Daytona Beach, Florida, and holder of permit as above-captioned to construct new transmitting facilities for Station WESH-TV, by its attorneys, and opposes herein the Joint Protest and Petition for Reconsideration filed on March 8, 1957, by Orlando Broadcasting Co., Mid-Florida Radio Corp., Central Florida Broadcasting Co., Mid-Florida Television Corp. and WORZ, Inc., all of Orlando, Florida. In support of its opposition, Telrad states:

The So-called Merits of the Joint
Protest and Petition are Demonstra-
bly Absent.

1. The protestants' first point (para. 10) is that the Commission erred in failing to send a McFarland letter to Telrad on its application (BMPCT-4150) raising the same question as was raised in the McFarland letter of August 31, 1955, addressed to Telrad on its earlier application (BMPCT-2846) for similar facilities.¹ The question raised was

¹ In their preliminary statement (para. 4-9), protestants have noted that the present new transmitter location is "three and one-half miles farther from Daytona Beach than the distance specified in the Commission's McFarland letter of Aug. 31, 1955, for the earlier proposal. Assuming arguendo that this difference is correct it is without significance, since protestants have failed to note at the same time that the distance (27.53 mi.) from the new site to Orlando is also 2.53 miles farther from Orlando than the 25 miles noted as the distance from the old site to Orlando by the aforesaid McFarland letter.

71 whether the proposal was designed to serve the particular needs of Daytona Beach and surrounding area in view of the fact that the Grade A signal of the proposal would include Orlando and a principal city signal would be rendered to part of Orlando.²

2. Protestants pretend to see significance in the Commission's failure to send a McFarland letter on the present Telrad application when one was sent on the former Telrad application because, so protestants allege, the former and the present proposals are identical and there are no facts and allegations contained in the present application which distinguish it from the former application. In this statement protestants are in error since they choose to ignore relevant differences, both in the applications themselves and in the context of conditions and Commission policies existing at the time of action.

3. In the first place, the former application failed to include any statement by Telrad as to the possible effect of the change on its program service. Such a statement was, however, made in the present application wherein it was stated that it was Telrad's plan to continue without substantial change the program proposal it submitted in the application (BTC-2175) (protestants' para. 7), augmented by an increase of operating hours with "as much additional service from the networks as may be available". The present application stated that one of the objectives to be attained by Telrad with the new transmitting facilities was the extension of this program service to "large areas of central Florida now without such service and to improve its service to Volusia County by means of a more centrally located transmitter and antenna near DeLand, the County seat, whereby it would bring a Grade A signal throughout all

72 of Volusia County". No such statement, nor any statement of objective, was made in the original Telrad application. Consistent with the statement of objective in Telrad's present application is a further

² Other matters, including possible lack of financial qualifications by the applicant, were also raised in the same McFarland letter as indicating the necessity of hearing.

statement that "for the convenience of the County seat area or other persons appearing on local originations who are closer to the proposed transmitter than to the main studio in Daytona Beach, an auxiliary studio will be maintained at the transmitter". (Emphasis supplied). No statement of intention to operate an auxiliary studio in Volusia County nor any specific reaffirmation of Daytona Beach as the main studio location was contained in the original application.

4. Protestants also choose to ignore a most significant difference in the context of conditions existing at the time the Commission acted on August 31, 1955, to send a McFarland letter on the original application and when it acted on February 6, 1957 (eighteen months later). Thus, on August 31, 1955, no station on Channel 2 was built or operating at Daytona Beach and a proposal was made to build such a station near Orange City. On February 6, 1957, a station, WESH-TV, was built and had been operating with studios at Daytona Beach for eight months. Protestants do not intimate that Station WESH-TV has not been operated as a Daytona Beach station, nor could they do so. (See attached affidavit of T. S. Gilchrist, Jr.). Hence, it is obvious that the present application was supported by the concrete assurance afforded by an improvement of facilities for an operating Daytona Beach station, whereas the former application was not.

5. Protestants have also ignored a change in the context of applicable Commission policies. Thus, on August 31, 1955, a rule-making proceeding was pending and under consideration to require, subject to exceptional circumstances, location of transmitters within five miles of the principal city. In its letter of March 5, 1955, objecting
73 to the former Telrad application, Mid-Florida called specific attention to Docket 11297. By Report and Order released November 15, 1955, the Commission refused to adopt the proposed limitation and said:

"The Commission's present rules afford wide flexibility in the choice of the transmitter sites. The proposed amendment, however, would place a fixed mileage limitation

on the location of such sites. We have carefully reviewed and evaluated the comments filed in this proceeding and have concluded that a fixed limitation on the location of sites is neither desirable nor practicable. In our view a provision which would require transmitters to be located within a specified distance from the city to be served could defeat the objectives of our Assignment Table by preventing the most efficient employment of television channels. It is essential, we believe, that the licensee retain flexibility in choosing a site since many varied factors enter into the selection of a site -- factors such as terrain, local zoning regulations, air hazard considerations, economics, etc." (Emphasis supplied).
13 RR 1535-6.

Not only was the proposal restricting transmitter locations by rule no longer in effect by 1957, but the Commission had, by case-to-case applications of the rules, developed new policy interpretations which found substantial changes of transmitter location to be proper and consistent with the public interest even though an improvement in service to a community larger than the station community was involved. One of these cases, i. e., Gulf Television (Ch. 11), Galveston (12 RR 447), was significant because it involved a protest, an evidentiary hearing,³ initial and final decision and even a review in the U. S. Court of Appeals which, by per curiam opinion, affirmed the Commission's action granting the application and found no error in its interpretation of public

74 interest considerations as affected by a site change. 14 RR 2069. In the Gulf Television case the site change involved a location 28.5 miles northwest of the center of Galveston, the station community, and only 22 miles from the center of Houston, the much larger city. The site change proposed by Telrad does not even raise the question raised in Galveston and resolved in favor of the move, since the Orange City site is still closer to Daytona Beach than to Orlando. It is not surprising to find that protestants prefer to ignore these subsequent and more recent

³ The issues in that case involved a number of allegations of fact not involved here concerning violations of Commission Rules, other than Sec. 3.606 and 3.607, as well as charges of improper promotion and advertising of the station, improper use of studios in Houston and other allegations of fact not present here.

policy interpretations,⁴ which find the public interest served by proposals such as that of Telrad which seek to bring about a more efficient and greater utilization of available channels so that an ever growing number of the public may enjoy availability of a wider choice of services.

6. In the concluding sentence of paragraph 10, protestants advance a wholly gratuitous speculation which is contrary to any reasonable interpretation of the matters set forth in Telrad's application. There is no fact alleged by protestants to substantiate their conclusion or

75 assumption that WESH-TV's programs would be designed to serve Orlando, if by this they mean the specific community needs of Orlando as against the specific community needs of Daytona Beach. As already noted the Telrad application reaffirms the intention to continue to operate WESH-TV with a program service designed primarily for Daytona Beach. As the Commission recognizes (Petersburg Television Corp. 12 RR 1395) this does not mean that WESH-TV must avoid or ignore Orlando or any other community within its service contours. See also Richmond Newspapers, Inc., 10 RR 567, 584 o, aff'd. 13 RR 2043. On the contrary, as Commission policy makes clear, every

⁴ Protestants refer (para. 10) to the McFarland letter recently addressed to the applicant in connection with the move of WMUR-TV closer to Boston. This reference is made to suggest that the Commission acted inconsistently in the two matters, i.e., WMUR-TV and WESH-TV. Again, protestants choose to ignore distinguishing differences. Thus, the WMUR-TV move was an essential part of a transaction involving proposed acquisition of the station by Storer Broadcasting Co. Also, the WMUR-TV transmitter was being moved, as protestants acknowledge, closer to Boston so that the distance of new location to Manchester would be 10.5 miles greater than the distance of the new location to Boston. But the key point raised against the WMUR-TV move was whether in view of the Hall case, 237 F 2d 561, the public interest would be served. There is no Hall case question involving the present Telrad application because there is no area losing Grade A or Grade B service as a consequence. Protestants have nowhere raised the Hall case in the instant case and, hence, the WMUR-TV McFarland letter is not an action inconsistent with the instant one. The two-year old WDEL application, to which protestants likewise refer, is also not pertinent here since Telrad, as noted above, also reaffirmed its continued studio and programming affiliation with the principal community of Daytona Beach.

station is expected to recognize the needs of all its viewers as well as the needs of viewers in Daytona Beach alone. Since the Telrad application shows that protestants are factually in error in their assumption that WESH-TV is to be an Orlando station, their wholly gratuitous statement about rates which stems from this false assumption, thus, falls of its own weight. This statement on rates in any event is speculative and purely hypothetical and entitled to no consideration under the law as a matter well pleaded.⁵ The matters alleged in protestants' paragraph 10 are, thus, entirely without merit.

76 7. In paragraphs 11 and 12 protestants address themselves to the question of network affiliation. As will be seen, there is no public interest question raised because the speculations, assumptions, and hypotheses indulged in by protestants are shown by the Telrad application itself to be without substance. Thus, protestants state in the first sentence of paragraph 11 that the new WESH-TV transmitting facilities will make WESH-TV in fact an Orlando market television station. But if this be the fact, there is nothing inimical to the public interest in Telrad's application since the Commission has repeatedly recognized that stations may properly permit or even encourage use of its facilities to national or other advertisers who may be interested in reaching a market other than the community primarily served by the installation in question. Hutchinson TV, Inc., 11 RR 1069; Tulsa Broadcasting Co., 12 RR 1256; Petersburg Television, 12 RR 1395; Gulf Television, 12 RR 447.

8. In the concluding sentences of paragraph 12, protestants state that Telrad is seeking a regular network affiliation with NBC and/or ABC. This, however, is fully consistent with Telrad's plans and

⁵ Though not necessary to the disposition of this unsupported and improperly grounded speculation about future WESH-TV rates, it is clear from the attached affidavit of T. S. Gilchrist, Jr. that as a Daytona Beach station WESH-TV will continue to be competitive with other media in Daytona Beach in soliciting the support and serving the advertising needs of Daytona Beach business.

representations on network affiliation as set forth in Exhibit 7, File No. BTC-2175, which protestants acknowledge.⁶ There is no basis for any charge of non-disclosure of affiliation plans. Protestants do

77 say that the affiliation sought by Telrad is one "as the regular Orlando television outlet". It is difficult to follow what impropriety there is in this since protestants themselves make the statement that the new WESH-TV transmitting facilities will make it in fact an Orlando market television station. Thus, if the networks and national advertisers choose to treat these facilities as adequate for an Orlando market outlet and thereby accept what protestants state to be a fact that can hardly be the consequence of any impropriety of conduct by Telrad in seeking a network affiliation. On the contrary, it means that protestants do not consider WESH-TV's continued association primarily with Daytona Beach as a bar to getting a regular network affiliation. It must be clearly understood, however, that the assertions by protestants that WESH-TV new facilities may be treated as adequate for an Orlando outlet do not change or affect WESH-TV's continued identification with Daytona Beach.

9. Protestants, lacking any facts to allege, lapse in their next statement into speculation by stating that Telrad has the intention and will to identify itself as an Orlando station. This gratuitous statement is unsupported by any matter advanced by protestants, having even the

⁶ Protestants' suggested (para. 12) that Telrad's original plans (BTC-2175) contemplated network programming as merely a "possible" presentation of "some" programs cannot be taken seriously. In BTC-2175, Ex. 7, Telrad said that it would "attempt to secure network affiliation, either by inter-connection or by kinescope as may be available". (Emphasis supplied). That this statement contemplated as full a network schedule as would be obtained for a station of its size facilities is perfectly clear from Exhibit 6 and from the amendment filed March 2, 1956, which showed Telrad's plans to be to devote as much as 62% of its total time to network programs. The attached Gilchrist affidavit points out that WESH-TV has broadcast such network programs as have been available to it, though these are only kinescopes.

color of a fact. It must, thus, be disregarded particularly since reference to the Telrad application shows, as noted above, that the applicant intends to continue the present identification of WESH-TV with Daytona Beach.⁷ Protestants aver finally that no substantial changes in programming will be involved as compared to the original application.

The fatal fault in this statement is that of lifting a single sentence out
78 of context. As noted in paragraph 3, supra, Telrad's intention was to increase its existing operating hours with as much additional program service from networks as may be available. The simple fact is that protestants are wrong in charging Telrad with non-disclosure of program plans.

10. Protestants, in paragraph 13, assert without any citation of supporting authority other than the positiveness of their stated conclusion, that the allocation table is violated whenever a station combines separate "market areas" or "economic sub-regions" in a common television service. This statement is so obviously wrong that it merits no further comment. Gulf Television, 12 RR 447; Petersburg Television, 12 RR 1395. One might venture to say that the combination, wherever feasible, of separate markets within the service contours of a single station is the rule rather than the exception.

There is No Merit in Protestants' Attack Upon the
Grant Because of Claims of Superiority for a
Hypothetical Site Picked by Protestants.

A. A Protest Seeking Comparison of a Granted
Application With a Hypothetical Site is Both
Contrary to Law and Destructive to Sound
Administration.

11. In paragraphs 14 and 15, protestants claim the right to an evidentiary hearing for the purpose of comparing the relative merits of the site specified in the granted application and a hypothetical site

⁷ Though not necessary to the disposition of the point, this identification is reaffirmed in the attached affidavit of T. S. Gilchrist, Jr.

chosen by protestants. Under Sec. 309(c) of the Act, parties in interest are given the right to a hearing upon a sufficient allegation of fact to show wherein the Commission erred in making a grant of an application without a hearing. Protestants seek to misuse this statutory scheme by requiring a hearing on a matter, i.e., hypothetical site of comparison, which the Commission itself could not legally utilize as a proper basis for denial of an application.

- 79 12. Under Section 307(b) and 308 of the Act, the Commission is required to act upon such applications as are filed with it for the power, frequencies, locations, and so forth specified in that application. In the absence of some rule of general applicability precluding consideration, the Commission may not refuse to accept or deny any application conforming to the rules merely because it specifies a power, frequency, site or other term inconsistent with some other power, frequency, site, etc, that the Commission may regard as preferable. It does not require explanation to see that if the Commission may not require an applicant, in response to a McFarland letter, to a Sec. 309(b) hearing issue, or to a ground for denial of his application, to justify his choice of a site as superior to all other available and possible sites, then clearly a protestant under Sec. 309(c) may not do so because it is not error for the Commission to fail to compare the site chosen by an applicant with all other possible sites that he might have but did not specify.

13. Not only was it not error for the Commission to have failed to have made a comparison of the Orange City site with the Bunnell site or any other available site,⁸ but the position asserted by protestants would lead to administrative chaos in the processing and disposition of

⁸ In this connection, except upon a showing nowhere made by protestants in the instant case, the Commission will not even permit an issue to be included in a comparative television hearing as to the relative merits in terms of coverage, populations served, etc., of different sites chosen by the applicants. Louis Wasmer, 9 RR 713; Petersburg Television Corp., 10 RR 537; Television East Bay, 11 RR 1102.

applications. Although protestants herein raise only a hypothetical site comparison, there is no logical nor legal reason why any protestant

80 under the theory of the Orlando protestants could not, likewise, question in AM or television the choice of frequencies, power, hours, studio location, program service, staff, or even indeed the very composition of the applicant itself, so that a non-resident, non-integrated, etc., applicant would have to be compared with a hypothetical resident, fully integrated non-applicant. Such a practice would be an administrative absurdity and monstrosity that would put in the hands of interested potential protestants the opportunity to require protest hearings on every grant on a comparative basis between the actual applicant and a hypothetical non-applicant.

B. There Is No Merit Even in the Engineering Data Submitted in Support of This Untenable Position.

14. Even if the Bunnell and Orange City sites were compared protestants fail in making even a prima facie showing of superiority for the Bunnell site.⁹ Before reviewing these matters, it may be noted that protestants utterly fail to establish any error committed by the Commission in permitting a station for a coastal community to move inland nearer to a much larger community where several stations were already operating so that increased overlap would result. See Gulf Television. They, of course, say that such action violates Sections 1 and 307(b) of the Act and Sections 3.606 and 3.607 of the Rules. But the only support for this bold assertion is in the comparisons made with

81 the hypothetical Bunnell site advanced by protestants (para. 15). These violations of the Act and Rules asserted by protestants as error

⁹ The last sentence of para. 14(a), the protestants seek to identify Telrad with making a proposal contrary to principles espoused by an affiliated company in a rule-making proceeding Docket 11361. This effort may be disregarded since the problems of choice of transmitter location and resultant coverage for Channel 10 which can only be located in the Bunnell area cannot logically be related to location of a Channel 2 facility without any such mandatory limitations.

by the Commission or as contrary to public interest in granting the Telrad application could not have been supported since protestants know that such charges of error were fully explored in the Gulf Television case and were not sustained either as error or as violations of law or rules. Gulf Television Co. 12 RR 447, aff'd. by U.S. Court of Appeals, Dec. 12, 1956; Houston Consolidated Television Co., 14 RR 2069.

15. There is attached hereto the sworn engineering statement of Telrad's consulting engineer. Tabulations therein compare the Bunnell and Orange City sites from the standpoint of determining how many persons within the Grade A and Grade B contours of each are now outside the Grade A or Grade B contours, respectively of any presently operating television station. From these tabulations it can readily be seen that the only significant difference between the two sites is in the number of persons who will for the first time be within the Grade A contour of a second station. From the Orange City site there will be 148,739 persons within its Grade A contour who are presently within the Grade A contour of only one operating station, whereas from the Bunnell site there will be a negligible 5,744 persons within its Grade A contour who are presently within the contour of only one operating station. Thus, the Bunnell site is substantially inferior in serving a present Grade A "gray" area while at the same time being materially no better in any other comparison of Grade A or Grade B signals.

16. The attached engineering statement further shows that the Bunnell site is inferior to the Orange City site in that it is about 13 miles closer to the ocean and, hence, appreciably more of the energy from a site at Bunnell would be dissipated over the water whereas the Orange City site would make a more efficient use of the channel by serving a greater land area. Gulf Television 12 RR 471.

82 17. The attached engineering further shows that the Bunnell site is inferior to the Orange City site in that it would fail to provide any Grade A service to the lower 20% of the area of Volusia County,

whereas the Orange City site would provide a Grade A signal over the entire area of Volusia County. This was clearly stated in the Telrad application as being an objective sought by the move. Thus, even if one overlooks the legal absurdity of a comparison with a hypothetical Bunnell site, there is no merit whatever in the claim that such a hypothetical site is clearly superior to the Orange City site.

18. A few observations remain to be made before leaving paragraphs 14 and 15 of protestants' pleading. In paragraph 14(a) and (b) protestants make several references to an obligation which they regard as falling upon a Daytona Beach station to satisfy the needs for service of areas and communities lying to the north and northwest of Daytona Beach. Of course, protestants fail to cite any Commission rule or policy that spells out such an obligation. Likewise, they fail to make any showing that the small area or community which lies beyond the Orange City Grade B contour, but within the Bunnell Grade B contour,¹⁰ is in any way dependent upon or associated with Daytona Beach economically, politically, or otherwise. The nearest point of this area is nearly 80 miles from Daytona Beach. Parts of this same area are less than 25 miles from the west coast of Florida. To suggest that this area is in

83 fact dependent upon Daytona Beach for service is preposterous. The same can be said about the failure of protestants to submit any facts to support their gratuitous conclusion that the Grade A area shown by hatching in Fig. 3 of protestants' engineering affidavit is dependent upon Daytona Beach. (Note protestants' issue (g)). On the contrary, the Commission's allocation table suggests no such dependence since it includes separate channel allocations for Palatka, which is the principal city in this hatched area, as well as allocations for Ocala and St. Augustine, which are each less than 15 miles from the nearest western and northeastern portions, respectively, of the hatched area.

¹⁰ It is, of course, to be noted from Ex. C of the engineering affidavit attached hereto, that an area of somewhat larger size will be dependent upon the Orange City site for its only Grade B signal, whereas it will be beyond the Grade B contour of Bunnell.

19. In paragraph 14(c) protestants refer to a "degradation" of service. This obscure phrase cannot refer to the WESH-TV signal from the Orange City site, since it is an undisputable fact that every area presently receiving Grade A service from WESH-TV will continue to receive Grade A service from the Orange City site and every area presently receiving Grade B service will continue to receive Grade B service from the Orange City site.¹¹ Gulf Television, 12 RR 447, para. 111.

20. It may be noted finally that protestants basically agree with Telrad's finding that by virtue of the aeronautical limitations, a tall tower cannot be constructed close to Daytona Beach, since they suggest one which is more than 20 miles away and only 5 miles closer to Daytona Beach than the Orange City site. There is, of course, no showing that any suitable land is available in the Bunnell area, whereas the Orange City site is available. Nor is there any clear statement by
84 protestants' engineer that a tower of the height assumed in its coverage data could be built near Bunnell. Protestants' engineer speaks only of a "tall tower" of unspecified height.

The Protest Must Fail for Lack of Any
Allegations of Fact Phrased Specifically
And Not Generally.

21. Under Section 309(c) a protest must be supported by a specification with particularity of facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. As to the requirement of Section 309(c) of a specification with particularity of facts, the Court of Appeals has said:

¹¹ In fact, except for a small portion to the north, every part of the present Grade B area of WESH-TV will be improved by receiving instead a Grade A service.

"Generalized objections are obviously insufficient under the statute without some specification of events and circumstances. But neither are we to measure the requirements of Section 309(c) by the technicalities of pleading formerly applicable to civil litigation. What is required is merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that a grant of the license was technically or financially unqualified, contrary to the Commission's initial finding. (Emphasis added and footnote omitted . . .)." 13 RR 388(b). Federal Broadcasting System v. FCC, 225 F 2d 560; 12 RR 2049-50.

In following this decision the Commission in the Lebanon Broadcasting Co. rejected issues for the insufficiency of allegations supporting them. The Commission said the allegations were defective in that they were speculations and not existing facts. Thus, statements based on the "belief" of the protestant of things that can or will happen or "what might be done by an applicant" are defective. 13 RR 388c.

22. The protest in this case is completely defective because it makes no allegations of fact with specificity. Instead protestants have tried to get by with self-serving conclusions, assumptions and speculations nowhere substantiated by any showing of why the conclusion,
 85 assumption or speculation is required or is substantiated. Protestants seem to believe that as long as they are willing to indulge the speculation, it must be treated as a fact. This is, of course, not the law as has been noted above. Any allegation concerning future conduct or intention, such as protestants have repeatedly raised herein are mere speculations in the bare form asserted by them, which are unacceptable unless all of the facts are submitted, which logically or legally require or lead to the conclusion or speculation. This protestants have failed to do and the protest is defective and must, therefore, be held to be insufficient under Section 309(c).

Even If the Protest Were Not Defective
 Protestants Would be Entitled Only to Oral
 Argument and Not to an Evidentiary Hearing.

23. Each of the protestants made the same basic objections that are now urged in the protest by filing letters prior to grant of the

Telrad application. Thus, it was charged that WESH-TV would become an Orlando station; that such an assignment with Grade A over all of Orlando would violate the allocation rules; that the greater coverage for WESH-TV from Orange City would necessitate a change in the character of the station; that the Telrad application was a subterfuge subverting Sec. 3.606 of the Rules and that Sec. 307(b) of the Act would be violated owing to the neglect by use of the Orange City site of coverage to the north. By letter dated February 6, 1957, reference 8820, the Commission advised each of the protestants that their objections had been carefully considered and that such objections were not found to be an adequate basis for designating the Telrad application for hearing. The Joint Protest now

86 filed by protestants is merely a more extended argumentation of the same basic objections¹² made before the grant. It is the Commission's policy in such circumstances not to order an evidentiary hearing but to consider the protest by hearing argument, since the Commission should, for reasons already shown, conclude that the matters asserted by protestants in this case, even if proved, would not provide adequate grounds for setting aside the grant. Watchtower Bible and Tract Society of N. Y., 14 RR 1214 (para. 12).

24. The Commission has stated in the past that it has no intention of serving as an arbitrator of a competitive situation. Gulf Television Co., 12 RR 472 (para. 112). The instant case is one where all of the matters asserted are basically referrable or reducible to the desire of the Orlando protestants to use the Commission and its processes to protect themselves from the competition which could arise from networks or advertisers who might wish to use WESH-TV's facilities in preference to the facilities of an Orlando station. Congress,

¹² The only allegations that could be considered new are those relating to Telrad's negotiations with networks. These, however, have no significance since, as already noted above, there is nothing in the allegations when related to Telrad's disclosures which would reflect adversely in any way on the public interest. Though no specific reference to the Bunnell site was made before, WDBO-TV did raise the bogus question of WESH-TV's responsibility under Sec. 307(b) to serve the areas and communities to the north of Daytona Beach.

however, has nowhere conferred any right to any station to be free from the competition of another facility authorized by exercise of the Commission's licensing power. Sanders Bros. Radio Station v. FCC, 9 RR 2008, 2011. There are here no allegations challenging the correctness of the Commission's findings of legal, financial, technical or other qualifications of Telrad. Only a vague general challenge of the public interest finding is made and this, as already shown,

87 is without merit and is a repetition of matters previously considered by the Commission. The protest is defective and it is obviously too late for it to be amplified or corrected upon reply to this opposition. O. R. Mitchell Motors, 14 RR 85.

88 The Commission Must Find That Public Interest
Would be Served by Not Staying the Effective
Date of the Grant.

25. Section 309(c) provides that, in the event of a hearing, the effective date of the grant will be postponed, "unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission authorizes the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing."

1 RR 10:89

26. In connection with the amendment of Section 309(c) of the Act in January, 1956, giving the Commission, upon a finding that public interest so required, the discretion to permit the grant to remain in effect pending hearing, the Senate Report stated that " . . . the Commission would have to consider not only the need for the new service in question but also the likelihood that the grant in question would ultimately have to be set aside." 1 RR 10:373

The Need for the New WESH-TV Service

27. Many facts and reasons exist to support permittee's position that public interest considerations require that the effectiveness of the grant not be suspended. Among the most important of these is the fact

that if permittee is allowed to proceed with construction already begun, the public will shortly receive a much needed new television service.

28. There is attached hereto and made a part hereof by reference the affidavit of permittee's consulting engineer showing by dotted space in Exhibit C that a substantial area generally around Ocala will receive its first and only Grade B television service from the new WESH-TV facilities. In this "white" area, a total of 25,719 persons would be served. In addition to this "white" area, there is a very substantial "gray" area wherein resides a large population of 212,680
 89 persons who presently live within the Grade B contour of only one existing station¹³ and would be receiving from Station WESH-TV's new facilities their first choice of television service. Letcher Broadcasting Company, 14 RR 187 (para. 11)

29. In terms of Grade A service, a large group of 47,508 persons would receive their first and only Grade A service from the WESH-TV operation with the increase in facilities authorized by the grant in question. The entire remaining land area included within the Grade A contour of WESH-TV's new facilities would be "gray" area for Grade A service within which WESH-TV would be affording the public a choice of programs with Grade A service for the first time. A public interest factor of special local importance is the fact that WESH-TV's new facilities would provide Grade A service to all of Volusia County within which Daytona Beach is located. All but the small portions of Volusia County now within WESH-TV's present Grade A contour (10 miles around Daytona Beach) and now within WDBO-TV's Grade A contour are now without Grade A service from any operating station. Of even greater local importance is the fact noted in the affidavit of Telrad's consulting engineer that portions of Volusia County are presently outside the Grade B contour of the only station operating on a channel allocated for use by any city within the county. In conjunction

¹³ This count assumes Station WFGA-TV (Channel 12), Jacksonville to be in operation though the station is not yet on the air.

with its objective to improve and bring new service to the county, Telrad has stated in its application that an auxiliary studio would be maintained by WESH-TV at its new transmitter location so as to provide ready access to the facilities of the station by the public residing in and around DeLand, the Volusia County seat, and location of John B. Stetson University, the only senior college in that part of the State.

90 30. In order that the Commission may be informed of Station WESH-TV's responsiveness to serving the needs of its community by its program service, there has been prepared and is attached hereto the sworn statement of T. S. Gilchrist, Jr., its General Manager. In this statement, which is a partial survey of Station WESH-TV's public service programming, it can be seen that the new service which WESH-TV would bring to the large populations now without that service would be a service fully responsive to the public's programming needs for locally originated live programs as well as suitable film programs of an informational or instructional nature.

31. A further important consideration requiring recognition of the need for the new service to be provided by WESH-TV is the fact established by the Gilchrist affidavit that the only stations, i.e., WDBO-TV, Orlando, and WMBR-TV, Jacksonville, presently operating to provide service within the greater part of WESH-TV's new service area are both basically and predominantly outlets for the same national network -- CBS Television. Hence, Station WESH-TV for the first time would bring to viewers now confined primarily to CBS network service a choice of network programs by providing NBC and/or ABC network programs.¹⁴ The need and importance to the public interest of having effective competition among stations as outlets for networks in all areas is made clear by the Commission's Second Report on Deintermixture. 13 RR 1571, 1576-7.

¹⁴ That WESH-TV would do so is conceded by protestants since they state it to be "an inescapable effect" of WESH-TV's operation with new facilities that WESH-TV would have an NBC affiliation and probably an ABC affiliation. See para. 1 of Joint Protest.

32. In this connection it is most important to Daytona Beach itself that the grant remain in effect so that Station WESH-TV can be
 91 operated with its new facilities, since as protestants appear to be willing to concede and as is Telrad's intention, Station WESH-TV can provide to Daytona Beach for the first time a regular national network service. Station WESH-TV with its present limited transmitting coverage has been unable to bring regular network service to Daytona Beach. See Gilchrist affidavit and Joint Protest, para. 8. There is only one station in operation other than WESH-TV that presently puts a Grade B or better signal into Daytona Beach. That single station is WDBO-TV, Orlando, which puts no better than a Grade B signal into Daytona Beach.

33. Until Station WESH-TV commenced operation, Daytona Beach had to depend for its television service entirely upon Orlando's single full power station. Station WESH-TV has now been operating for over nine months with limited coverage facilities which have not made it possible for Daytona Beach to receive a regular network service from its only station. The Orlando protestants are willing to concede that with its new transmitting facilities, WESH-TV could for the first time bring to the people of Daytona Beach and surrounding area a regular national network service and as pointed out herein a choice of programs. However, in their own selfish interest to perpetuate their television domination over Daytona Beach and to continue its subjugation to the interests of Orlando, the Orlando protestants are seeking to deny to Daytona Beach even now the new service promised by WESH-TV and authorized by the Commission after full consideration of Orlando objections. The interest of Daytona Beach and the large populations elsewhere that would receive WESH-TV's new service should not be denied that service to satisfy the private self-interest of Orlando protestants, whose sole right as parties in interest under Section 309(c) is to raise questions of injury to the public interest
 92 and not their private interest. Federal Broadcasting System, 239 F(2d) 941, 944. Thus, aggravation of protestants' competitive situation does not constitute allegations of fact adversely affecting the public interest. Wm. E. Walker, 14 RR 526, 532.

34. As shown by the attached affidavits of John H. Perry, Jr., its President, and T. S. Gilchrist, Jr., its General Manager, Telrad is ready, willing and able to proceed with despatch the work it has already expeditiously started in building WESH-TV's new transmitting facilities, which it believes can be ready for operation in four months in August. It is earnestly and urgently prayed on behalf of the real public need and interest which exists in receiving this new service in both "white" and substantial "gray" areas that the grant be continued in effect so that the station may be built as soon as possible and as authorized by the Commission in its action of February 6, 1957. Letcher Broadcasting Company, 14 RR 183, 187-8 (cases cited para. 13). Though the Orlando protestants request that the effective date of the WESH-TV grant be suspended, they have made no showing of any kind that the circumstances of this case do not permit the Commission to exercise its discretion upon a public interest finding that the grant should remain in effect. The protestants may not rectify this omission by using such reply as they may choose to file to this opposition as a vehicle for arguing or rebutting WESH-TV's showing herein.¹⁵ O. R. Mitchell Motors, 14 RR 85.

35. With respect to the "likelihood that the grant would ultimately have to be set aside" as referred to by the Senate Committee Report, 93 1 RR 10:373, there is every assurance in this case that the grant would not ultimately have to be set aside. In the first place, the substance of protestants' objections to the grant have already been carefully considered and found not to constitute an adequate basis for designating the Telrad application for hearing. See letters, Reference 8820, dated February 6, 1957, addressed to each of the protestants. In the second place, as is fully developed hereinbefore, there is no merit in matters asserted by the Joint Protest which additionally is defective as a protest in failing to

¹⁵ Such a "lay back" tactic would be unfair and grossly prejudicial to WESH-TV and the interests of Daytona Beach since it would afford no time or opportunity to answer the protestants' position on this point which they have in effect reserved by not including it in their Joint Protest.

fulfill the requirements of the law for a specification "with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest" (emphasis supplied). 1 RR 10:88-89

WHEREFORE, it is prayed that (a) the Commission decide as provided by Section 309(c) that the protest is insufficient for failure to meet the requirements of that section; (b) that, if the Commission should find the protest sufficient, protestants be afforded only the opportunity for oral argument since the facts that are well-pleaded even if proved would not provide grounds for setting aside the grant of Telrad's applications; or (c) that, if an evidentiary hearing is required, the burden of proof of proceeding be placed upon the protestants and the hearing expedited.

In the event of either (b) or (c) above, it is prayed that the Commission affirmatively find, as provided by Section 309(c), for reasons set forth in its decision, that the public interest requires that the grant remain in effect, and that Telrad be authorized to utilize the authorization
94 in question pending the Commission's decision.

Respectfully submitted,

TELRAD, INC.

By Dempsey and Koplovitz
Its Attorneys
938 Bowen Building
Washington 5, D. C.

By
William C. Koplovitz

By
Frederick H. Walton, Jr.

March 18, 1957

CERTIFICATE OF SERVICE

STATE OF FLORIDA
COUNTY OF DUVAL

who, being first duly sworn, deposes and says:

**John H. Perry, Jr., President
TELRAD, INC.**

A. D. 1957.

Notary Public, State of Florida at large
My commission expires Sept. 11, 1959

96 CITY OF WASHINGTON)
) SS
 DISTRICT OF COLUMBIA)

S T A T E M E N T

I, Thomas S. Gilchrist, Jr., being duly sworn, depose and say that:

I am Vice-President and Director of Telrad, Inc., and am employed, among other capacities, as the General Manager of Station WESH-TV.

Telrad, Inc. has been and is proceeding without delay to accomplish all steps necessary to get Station WESH-TV, Daytona Beach, Florida, on the air as soon as possible with the increased technical facilities authorized by the Commission in permit BMPCT-4150. Orders were placed last month with manufacturers or suppliers for all basic equipment and material not obtainable locally. Preparation of tower specifications is now underway, completion of which is expected very soon. The necessary contracts by Telrad, Inc. to secure by lease the use of the transmitter site have been executed and surveyors are now in the process of surveying the property for the location of the tower and transmitter building. Test drillings, grading, excavation or other preparation of the land for physical construction will commence as soon as tower specifications are received. Actual equipment deliveries are anticipated beginning in April, and if permitted to proceed, it is expected that construction of the new transmitting facilities will be completed in August.

97 The station's main studio will continue to be located as it is now in the new WESH-TV studio building in Daytona Beach. As proposed in our application, we intend to maintain an auxiliary studio at our new transmitter location, which is only 5.5 miles south of Deland, the seat of Volusia County. Thus, Station WESH-TV, even with its new facilities, will continue to be operated and be identified as a Daytona Beach station and will continue to be competitive with other local media in soliciting the support and in serving the advertising requirements of local and county business concerns. As stated in our applications, BTC-2175 and

BMPCT-4150, it has been and still is our desire and intention to affiliate with NBC and/or ABC national television networks. Though Station WESH-TV has not had a regular network affiliation in the past, it has endeavored and has telecast, wherever feasible, such network kinescopes as were available on a per program basis.

Station WESH-TV has devoted its facilities and will continue to devote its facilities to serving the needs of local community service organizations through live and film programming, announcements, and other promotion. Many local live programs are carried each week by WESH-TV. In a current week approximately 20% of the evening hours were local live programs. In order that the Commission may have an appreciation of the public need being served by Station WESH-TV, there follows a partial survey of Station WESH-TV's programming in the public interest. Typed copies of a few of the letters received from public service groups are also attached hereto. Station WESH-TV plans to extend this program service to many areas in Volusia County and adjoining

98 counties now without any television service originated in Daytona Beach. It is also believed that this service will meet a need for those many other communities which have been dependent upon either Station WDBO-TV, Orlando, or Station WMBR-TV, Jacksonville, for their only service and which, for the first time, would receive a second or competing service from Station WESH-TV. In this connection the programs of the CBS television network constitute the basic or predominant network service now available in areas that will receive service for the first time from a second television station, i. e., Station WESH-TV.

Thus, of some 115 programs on NBC only an approximate 14 are telecast by WDBO-TV. ABC schedules some 61 programs each week. Only an approximate 12 are carried by WDBO-TV and some 13 by WMBR-TV. WDBO-TV carries some 124 CBS programs weekly while WMBR-TV carries approximately 142 programs from CBS, therefore duplicating the majority. Program service from CBS and NBC affiliates in Tampa is dependable in only a minor section of the area concerned.

The St. Petersburg ABC station and the Jacksonville NBC stations, being UHF, offer little or no service. There are some 160 NBC and ABC programs not seen at all in most of the area concerned. Many of the NBC and ABC programs carried by WDBO and WMBR are kinescope delayed broadcasts offering less desirable quality and broadcast time--and out-dating of programs.

The following statement of program service by Station WESH-TV has been prepared at my direction and I know, or to the best of my knowledge and belief, believe it to be true and correct.

99 Educational Programs:

Time has been made available to the various schools and universities in the area which WESH-TV serves.

Stetson University:

Although the university is not yet prepared for a regular weekly program, any event taking place at the university is given ready consideration and accommodated in existing programs through participation in sports, Nature Notes, Interview programs. These have included among others, ROTC, musical and drama participation.

Bethune Cookman College:

Time was made available and still is available for the college to present a weekly program. However the college preferred to present special feature programs, rather than a regular series if time could be made available to them. As mentioned previously, time will be made available to them, as well as other schools and universities in the area.

The facilities of the station have been used for the College's 1/2-hour Founders Day program, which included the President of the college, Mr. Moore; Dean of Men, Dr. John Smith; one of the first students and graduates of Bethune

Cookman College; departmental heads and Board of Directors.

The College Choir has been presented in a 1/2-hour program of Christmas Carols.

The Football coach and team members have been presented on sports programs.

(See Religious for other Bethune Cookman activities... also Sports)

Mary Karl Vocational School:

Here again, time is available to the Vocational School to present additional programs. Presently the school is using the spot announcement method to promote registration in the various courses offered the public. There has been presented with the school a series of four programs----Beauty Culture, Practical Nursing, Small Motor Repair and Photography.

100 High Schools:

Time is available to the schools for the presentation of various programs and publicity.

Several schools have participated in sports and music programs.

In addition, Deland High School has presented several musical programs on the station.

Nature Notes: See special write-up on Nature Notes.

Nike Display by U. S. Army: See Tonite and Tomorrow

Additional Educational type programs are listed under Tonite and Tomorrow with such titles as, Flower Displays, Arts and Crafts, Cooking Programs, Flying Saucers, etc....etc....

Public Schools:

We have presented special school activities taking place.

Also, teachers were presented along with pupils to highlight various school events, such as Halloween parties and School Circus.

Scheduled for broadcast March 27th is a half-hour teachers' forum to discuss problems facing the teacher today, and how best to eliminate them. Present teaching methods will be compared to 20 to 30 years ago. All aspects of the teaching profession will be presented.

- 101 One of WESH-TV's regular educational programs is the now one-half hour weekly evening program--Nature Notes. This program has received the complete cooperation of the Universities in this area, as well as leading educators from the Colleges. Stetson University, U. of Florida, and within another month the U. of Miami will send scientists to appear on a program.

The purpose of the program is to create a desire for additional knowledge, through an entertaining presentation understandable to all age groups. It has brought before the WESH-TV cameras noted educators and scientists with live and mounted animal specimens....bees, octopus, rare breeds of dogs, butterflies and moths, fish and plant life. And we believe for the first time on TV, actually showed bacteria through a microscope--LIVE not filmed. Fossils - shells and animal.

Community College:

In cooperation with the Continuing Council on Education WESH-TV scheduled four one-half hour programs, Friday nights 7-7:30, for an informal discussion of the subject: A COMMUNITY COLLEGE for Volusia and Flagler Counties. Participants included: Educators from the State, County and local level as well as a cross-section of students planning to attend college in the near future. Also discussed were costs

of construction, tuition, adult education and vocational education. The public was invited to lend support by way of letters and post card endorsements. Questions from viewers were invited, either by phone for the program on the air, or card or letter for future programs. In addition to the program, WESH-TV gave Public Service Announcements re the Community College for the area, as well as calling attention to coming programs.

In addition to the foregoing education programs, the station devotes several time periods each week to instructional and informational subjects. In a typical week between one-half and one hour is devoted to live presentations with one hour to one hour and a half for film.

102 RELIGIOUS:

Time is made available to the local ministerial association which is composed of Protestant (white and colored) and Jewish faiths, for broadcasts to be conducted by them, on a non-sectarian basis with station assistance. The first program developed was entitled: "Evening Meditation" which consisted of the ministers of the association, and quartets and choirs. After the first of the year the program was changed from Evening Meditation to Evening Prayer... which is recorded on tape and used just before sign-off of the station. This was more appealing to the association than the 5-minute live program at a late hour. A regular one-half hour live weekly program is presented with the local First Baptist Church. In addition, we presented the Association with a program idea. Many excellent religious films are being produced and that they could choose, if they desired, the religious series we should use on the station. It was decided by the association that the one-half hour series would be of a 13-week duration, and at that time they would have selected another series to be used on the station. Time, Sunday 10-10:30 PM.

Among other Religious Programs now Scheduled:

Bishop Sheen, Tuesday 8:30 -9 PM. This program is presented by

Channel 2 and the cost of the film is borne by the station.

Christian Laymen's Witness, Friday 4:15-4:30 PM. (Film)

**Among other Religious Programs Which Have Been Present-
ed:**

This is the life -- Lutheran Series.

The Way -- Methodist religious drama.

Putting Christ Back

into Christmas - Chaplain of Bethune Cookman College.

Christmas Carols -- Bethune Cookman College Choir - one-half hour.

TALK: Civic and Public Service.

A regular 15 minute daily (Monday-Friday) WESH-TV feature is a program designed to give the highlights of activities throughout the area served, including interesting places to visit and coming attractions and events. In addition to the above-mentioned, personalities of the area are brought before the cameras with interesting stories and hobbies, as well as club groups, schools, and other civic and public service groups. Some of the many varied subjects presented on this program are:

103 Arts and Crafts.

Flying Saucers discussion by Atry Ray Selden.

Cooking Hints with actual kitchen demonstrations.

Cooking programs.

Interviews with Drive Chairmen for Cancer, TB, Polio,
Heart. Promotion of same.

Dental Care.

Beauty Culture - Mary Karl Vocational School.

Photography - Mary Karl Vocational School.

Practical Nursing - Mary Karl Vocational School.

Small Motor Repair - Mary Karl Vocational School.

Nike Display - U. S. Army.

Civic Music Association.

Insurance - Types and Importance. The insurance laws.

Tomoka State Park - Historical Society.

Volusia County Psychologist speaking on "Child Behavior".

American Way of Life - Atry Pierce & Dr. Hage of Stetson University, Deland, Florida.

Stetson Quartet - Stetson University, Deland, Florida.

Stetson Dramatic Club - Dramatic presentation of a Biblical pageant, Deland, Florida.

High School Glee Clubs - Daytona and Deland High Schools.

Importance of Defense and College Life - Stetson U. ROTC, Deland, Florida.

"CIVIL DEFENSE IN ACTION"- covering 3--day alert, with Fred Demott CD Dir., and staff.

Personalities appearing on the program: Bill France, NASCAR; Ralph Story of the \$64, 000 Challenge; Dennis James and wife; Betty Skelton; officials of Plymouth Corp.; Paul Whiteman; winners of NASCAR races and many other local personalities.

Flower Show promotion and program.

Garden Club series of 13 weeks, currently in progress.

Beauty contestants.

In addition to those mentioned, other local organizations, representatives, or events which have used the facilities of Station WESH-TV for "LIVE" programs or presentations, have been:

Social Security Director

Junior Welfare League -- Orthopedic Center

Daytona Beach Little Theatre.

Chamber of Commerce.

Salute to Businessmen and Greater Daytona Beach Days.

Jaycee Underprivileged Children's Christmas Project.

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Palmette Follies Cancer Drive Program.

Local Election Returns.

National Election Returns.

Armed Forces Recruiting.

Interview of Gov. and Mrs. Goodwin Knight of California,
and Sen. Russell Long.

Another live public service feature on WESH-TV was the JC-Forum Series which ran in a 20-week series as a one-half hour evening program. This program, dedicated to Community, County and Civic projects, was designed to present to the public important issues of interest to the County and community in general. It is WESH-TV's plan to resume another series of such programs. Each program had a moderator and a panel to discuss the issues pro and con. Among the issues discussed:

Floridation.

Safety on the Beach - Life Guards.

Importance of Social Security.

Hire the Handicapped.

Chamber of Commerce Activities.

The Ad Tax.

Florida Industrial Commission - J. Saxton Lloyd.

Wild Life.

AGRICULTURAL:

National, State and area agricultural market reports are broadcast live to viewers in a 5-minute daily telecast (Monday - Friday). This telecast is preceded each day with a live 5-minute weather telecast. In about two weeks, WESH-TV expects to be able to commence a film series in cooperation with the Florida Department of Agriculture.

ENTERTAINMENT:

In addition to various musical programs with local school and church organizations, WESH-TV presents an hour or more weekly of local live musical and other entertainment.

SPORTS:

Daytona Beach is primarily a tourist city, therefore the city recreation department provides various and sundry sport activities for the tourist. With this in mind the daily Sports Telecast consists of the general run-down of the sporting world and local interviews and sport activities. The national picture is supplemented with UNIFAX pictures.

Locally in sports -- Interviews with various coaches, football, basketball, and players, including:

Bethune Cookman College.

Stetson University.

Seabreeze and Mainland High School.

Elementary basketball team.

Little League players.

Babe Ruth Little Leagers.

Bowling.

Golf-pros.

Tennis-pros.

Recreation Department announcements and personalities.

Wrestling, including Red Berry and others.

Racing events, Motorcycle and Auto, including films of events.

Drag Racers.

Personality Jack Dempsey.

PUBLIC SERVICE ANNOUNCEMENTS:

Sample check of spots for the last quarter of 1956 showed that WESH-TV programmed approximately 150 public service announcements per week. WESH-TV was on the air 6-hours and 10 minutes daily during this period.

Public Service announcements included:

Recruiting for Army, Navy, Air Force, Marines, Coast Guard and the nearby Reserve units.

YMCA	U-S-O- Mail Call
US Savings Bonds	Mail Early -- before Christmas
Fire Prevention	Timber
106 Employ the Physical	Future of America
Handicapped	Ground Observer Corps
Heart	Blind
Cancer	Sister Kenny Foundation
Tuberculosis	Auto Safety
CARE	Better Schools
Veterans Administration	Big Brother
Humane Society	Blood
Red Cross - Hungarian Relief	Boy Scouts
Religion	Boys Clubs
Social Security	Civil Air Patrol
Prevent Forest Fires	Crusade for Freedom
Requests from Police Department	
Civic Clubs etc.	

Just past was the March of Dimes and currently is the United Fund -- spot campaign.

The foregoing matters are true and correct of my own knowledge, except those made on information and belief, and those, I verily believe to be true.

/s/ T. S. Gilchrist, Jr.

T. S. Gilchrist, Jr.

Subscribed and sworn to before me this 15th day of March, 1957

/s/ Kathleen E. Norwood

Kathleen E. Norwood
Notary Public, D. C.

My Commission expires January 31, 1958.

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AMERICAN CANCER SOCIETY
Florida Division, Inc.

Information Center
Williams Hotel Room 3
Daytona Beach, Fla.

October 11, 1956

Mr. Bill Hall, Program Director
T.V. Station W.E.S.H.
Daytona Beach, Florida

Dear Mr. Hall:

The Volusia County Unit of the American Cancer Society and all of those who participated in the planning for the Seminar for Nurses were very pleased with the response we had to the Conference. A great part of our success of this Seminar was due to your help. We want you to know how grateful we are to you for giving us publicity over Station W.E.S.H. so generously.

We believe that many people were reached with vital information about cancer through this effort and want to thank you for your part in making this possible. We hope that you will give this vital cause your continued support.

Thank you again.

Sincerely yours,

/s/ Ruth Zimmer

Ruth Zimmer,
Executive Director

RZ/par

108 FIRST ATLANTIC NATIONAL BANK OF DAYTONA BEACH
Daytona Beach, Florida

2-26-57

Dear Mr. Hall;

Here are three passes with the names on them so would you please give them to Cathy, Charlie and yourself and I wish to thank all of you for the help you are giving our children. I feel we do not do enough to help the children who are not handicapped and with our Little League we give them a change to stay busy and out of trouble in the summer.

Thanks again and I hope to see you at the Carnival.

/s/ Mona Conrad

109 CAMP FIRE GIRLS, INC.
16 East 48th Street
New York 17, N. Y.

February 4, 1957

Mr. William G. Hall, Program Director
WESH-TV
Daytona Beach, Fla.

Dear Mr. Hall:

Thank you very much for letting us know that you will schedule Camp Fire Girls slide/telop and announcements on Station WESH-TV during the week of March 17th.

We are deeply grateful to you for your generous support of our organization and its effort to expand its services to more girls who need and want its program of leisure-time activities.

On behalf of the entire Camp Fire family, may I express our sincere appreciation of your fine cooperation?

Sincerely yours,

/s/ Elizabeth M. McStea

Elizabeth M. McStea
National Public Relations Director

110

CONTINUING COUNCIL ON EDUCATION
Volusia County, Florida

1200 Riverside Drive
Holly Hill, Florida
March 12, 1957

Mr. William T. Hall
WESH-TV
Center Street
Holly Hill, Florida

Dear Mr. Hall:

On behalf of the Coordinating Committee of the Continuing Council on Education, I wish to express our appreciation for the time you allowed over WESH for the programs on the proposed Community Junior College and also for writing the spot announcements to be used by the radio stations.

Such cooperative effort on your part aided greatly in informing the public about our proposed project and in gaining the desired endorsements from individual citizens and from civic groups.

Thank you very much.

Very truly yours,

/s/ Eleanor D. McCommons

Eleanor D. McCommons
(Mrs. J. L.)
Corresponding Secretary

111

BIG BROTHER MOVEMENT
of
VOLUSIA COUNTY, FLORIDA
Incorporated

121-1/2 North Boulevard
Deland, Florida

October 1, 1956

WESH-TV Station,
P.O. Box 1712,
Daytona Beach, Fla.

Att: Wm. G. Hall
Program Director.

Dear Mr. Hall:-

Thank you for your letter of Sept. 25th in answer to ours of Sept. 24th and we are happy too to have you run our film "Adventure in Friendship".

We do know how you make up your programs and will be grateful to know just when to deliver the film to you.

Our meeting will be held in Daytona November 19th, and think it would be wise to show the film BEFORE that meeting, as it should help get good stout hearted men out.

Looking forward to date of delivery of film to you, I am,

Most sincerely,

Executive Director.

/s/ Mrs. V. Grogel.

VG/c

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COMMUNITY COLLEGE COMMITTEE
CONTINUING COUNCIL ON EDUCATION
Volusia County, Florida

February 1, 1957

Manager, Station W.E.S.H.-T.V.
Holly Hill, Florida

Dear Sir:

The Community College Committee wishes to thank you for the splendid coverage you have given this committee's efforts to bring its aims and purposes before the public.

Thank you sincerely.

/s/ Mrs. E. T. Kuhner

The Community College Committee,
Mrs. E. T. Kuhner, Sec'y.

113

Volusia County
TUBERCULOSIS & HEALTH ASSOCIATION, INC.
200 So. Ridgewood Ave.
Daytona Beach, Florida

January 24, 1957

Mr. William Hall
Television Broadcasting Station WESH-TV
Center Street
Holly Hill, Florida

Dear Mr. Hall:

The Board of Directors of this association, as well as the Seal Sale Committee, are deeply grateful to you and your associates for the service time given us during our recent fund campaign.

As you may know, our association is not a member of the United Fund so that we received a minimum of newspaper publicity. We feel that it was such cooperation as you gave us that helped put our drive over the top.

Our sincere thanks and appreciation!

Cordially,

/s/ Leroy E. Northrup

Leroy E. Northrup, Chairman
Seal Sale Committee

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GREATER DAYTONA DOG FANCIER'S ASSOCIATION, INC.
P.O. Box 5131
Daytona Beach, Florida

9 January 1957

WESH-TV
Att: Mr. William Hall
Daytona Beach, Fla.

Dear Mr. Hall:

On behalf of the members of the Greater Daytona Dog Fanciers' Association, I wish to thank you and your staff and station for the assistance given us on the TV shows and spots. Putting the dog show before the public is a most important phase in its success.

We deeply appreciate your help, and we hope that you will be able to attend the dog show at some time during the day or evening of Monday, January 14th, at the Armory.

Sincerely,

/s/ Pauline Bennett

Pauline Bennett, Secretary

115

A F F I D A V I T

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

Robert E. L. Kennedy, having been duly sworn, deposes and says:

1. That he is a qualified engineer engaged in consulting engineering in the city of Washington, District of Columbia; that he has been granted registration to practice as a Professional Engineer in the District of Columbia; that he is a member of the firm of Kear and Kennedy, and that his qualifications are a matter of record with the Federal Communications Commission.

2. That the firm of Kear and Kennedy has been retained by the Telrad, Inc., permittee of WESH-TV, Daytona Beach, Florida, for the performance of certain engineering duties in connection with its reply to the "Joint Protest and Petition for Reconsideration" concerning the FCC grant of a modification of construction permit for WESH-TV to move its transmitter and antenna location, increase its effective radiated power and increase its antenna height above average terrain.

3. That he has prepared or caused to be prepared under his immediate supervision the following exhibits in accordance with the FCC's Rules Governing Radio Broadcast Services:

EXHIBIT A

Engineering Statement.

EXHIBIT B

Map Showing Grade A Services in Pertinent WESH-TV Areas.

116 EXHIBIT C

Map Showing Grade B Services in Pertinent WESH-TV Areas.

EXHIBIT D

Map Showing Loss of Grade A Service in Volusia County from Bunnell Site.

EXHIBIT E

Population and Area Summary.

4. That the foregoing statements and the afore-mentioned exhibits which are attached to and form part of this report are true and correct of his own knowledge except such statements as are on information and belief, and as to such statements, he believes them to be true.

/s/ Robert E. L. Kennedy
Robert E. L. Kennedy

Subscribed and sworn to before me this 14th day of March 1957.

/s/ Ambrose J. Cavegn
NOTARY PUBLIC, D.C.

My Commission expires October 1, 1960.

117 EXHIBIT AENGINEERING STATEMENT

118 The engineering in this report supports the reply of Telrad, Inc., permittee of WESH-TV, Daytona Beach, Florida, to the "Joint Protest and Petition for Reconsideration" against the grant of a modification of construction permit for WESH-TV to move its transmitter and antenna location, increase its effective radiated power and increase its antenna height above average terrain.

The application for modification of construction permit filed by WESH-TV, FCC File No. BMPCT-4150, contained a statement pertaining to the selection of the Orange City area for the proposed TV tower which is directly quoted as follows: "This site was selected

after many conferences with aeronautical interests and is the only acceptable location that a 1,000 foot antenna system can be erected and provide the required city grade service to Daytona Beach, Florida." The suggestion that another acceptable area exists and the calculations based upon using this hypothetical site which are contained in the aforementioned "Joint Petition" have been proffered without any supporting evidence as to the actual availability of the Bunnell area for a television tower of this height proposed by WESH-TV. Without supporting data, therefore, the availability of the Bunnell site must be viewed as a purely hypothetical situation and the calculations viewed in the same light.

Further, even assuming that the Bunnell site could be approved for the WESH-TV requested height, there would accrue a loss of Grade A
 119 service to approximately 20% of Volusia County as well as an additional waste of both Grade A and Grade B service over the Atlantic Ocean. These additional losses amount to 18% of the area within the Grade A contour and 7% of the area within the Grade B contour. At present, 10.7% of Volusia County is outside the calculated Grade B contour of WESH-TV. The Bunnell site is approximately 20.5 miles from the Daytona Beach reference point.

The accompanying exhibits showing other Grade A and Grade B services available in the Daytona Beach area were analyzed to determine various pertinent populations and areas. The population and area tabulation included with this report shows the calculated services available to the individual areas at present. The numbers indicated on the maps do not take into account WESH-TV operation from either the Orange City or Bunnell site. It may be seen from examination of the tabulation that the Orange City calculated Grade A contour encompasses 47,508 persons that are not within any calculated Grade A contour at present. It should be noted that this study shows that there is a difference of only 5,411 persons between the Bunnell and Orange City figures, in this case. Although the difference shown in the "Joint Petition" is greater than 5,411, this study indicates that a larger number than the above may be unduly pessimistic. In addition, there

are 148,739 persons within the Grade A contour of WESH-TV operating from Orange City that will be within their second Grade A contour. This compares to only 5,744 persons in this category assuming operation of WESH-TV from Bunnell.

120 The tabulation further shows that the Grade B populations and areas pertinent to the study are approximately the same for both the Orange City and Bunnell sites.

The population study was completed on the basis of uniform rural population distribution in the minor civil division. All areas have been adjusted by subtracting bodies of water having appreciable size.

The engineering data contained herein has been prepared in accordance with the Federal Communications Commission's Rules Governing Radio Broadcast Services.

For Exhibits B, C, and D see Record page nos. 122, 124, 126 as follows:

121 EXHIBIT B (Record Page No. 122)

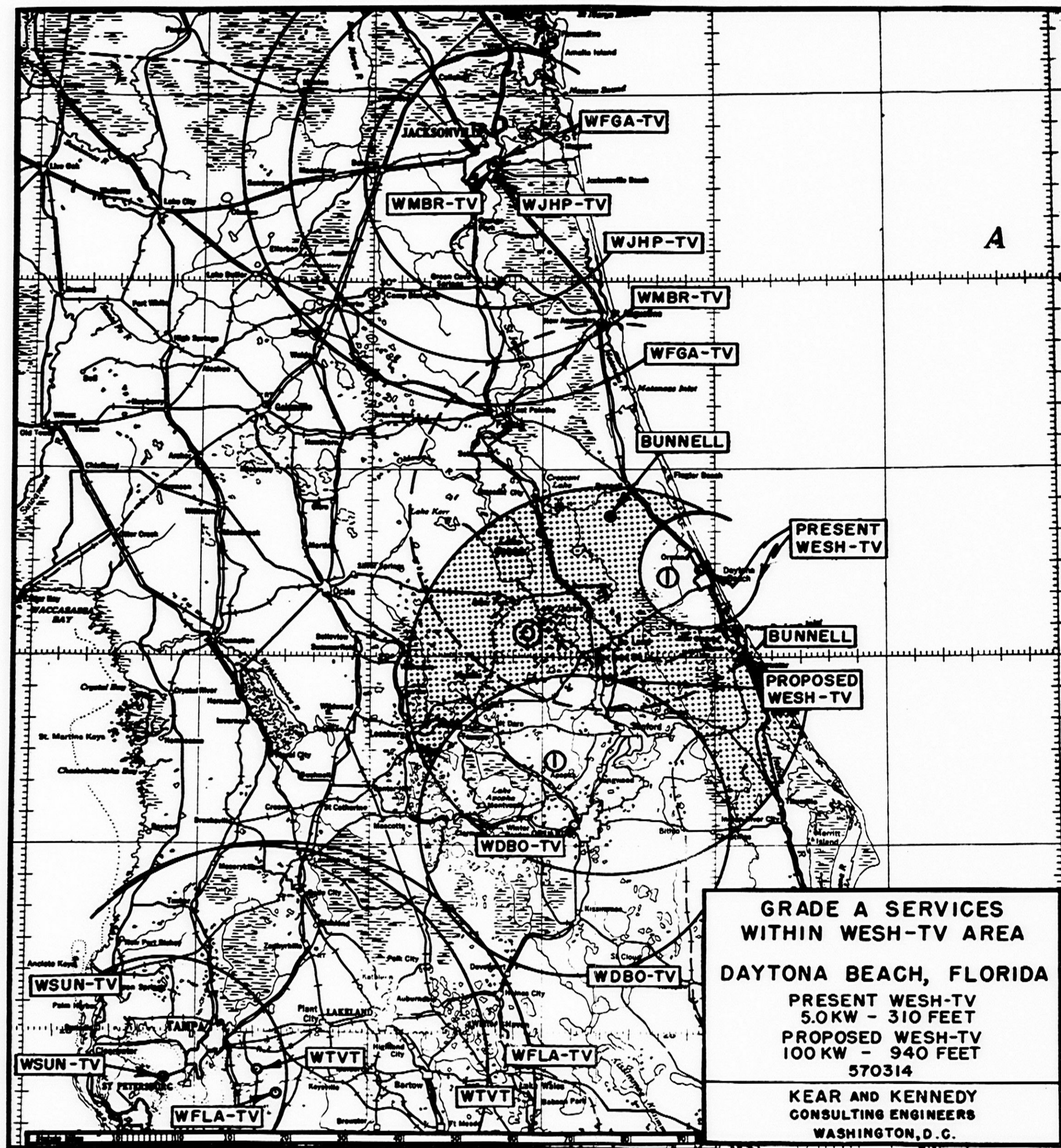
MAP SHOWING GRADE A SERVICES IN PERTINENT WESH-TV AREAS

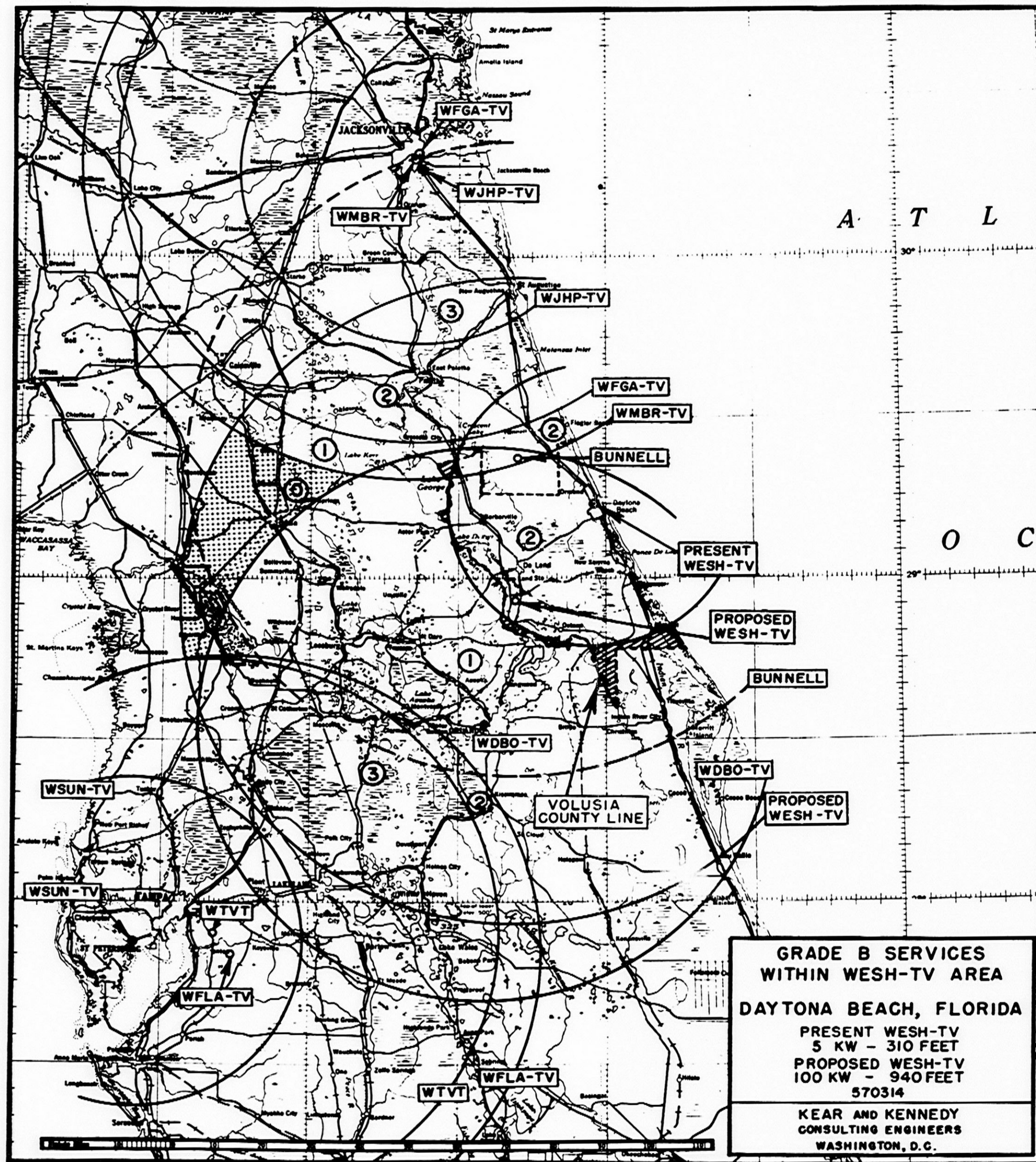
123 EXHIBIT C (Record Page No. 124)

MAP SHOWING GRADE B SERVICES IN PERTINENT WESH-TV AREAS

125 EXHIBIT D (Record Page No. 126)

MAP SHOWING LOSS OF GRADE A SERVICE IN VOLUSIA COUNTY
FROM BUNNELL SITE





T I C

126

O

E

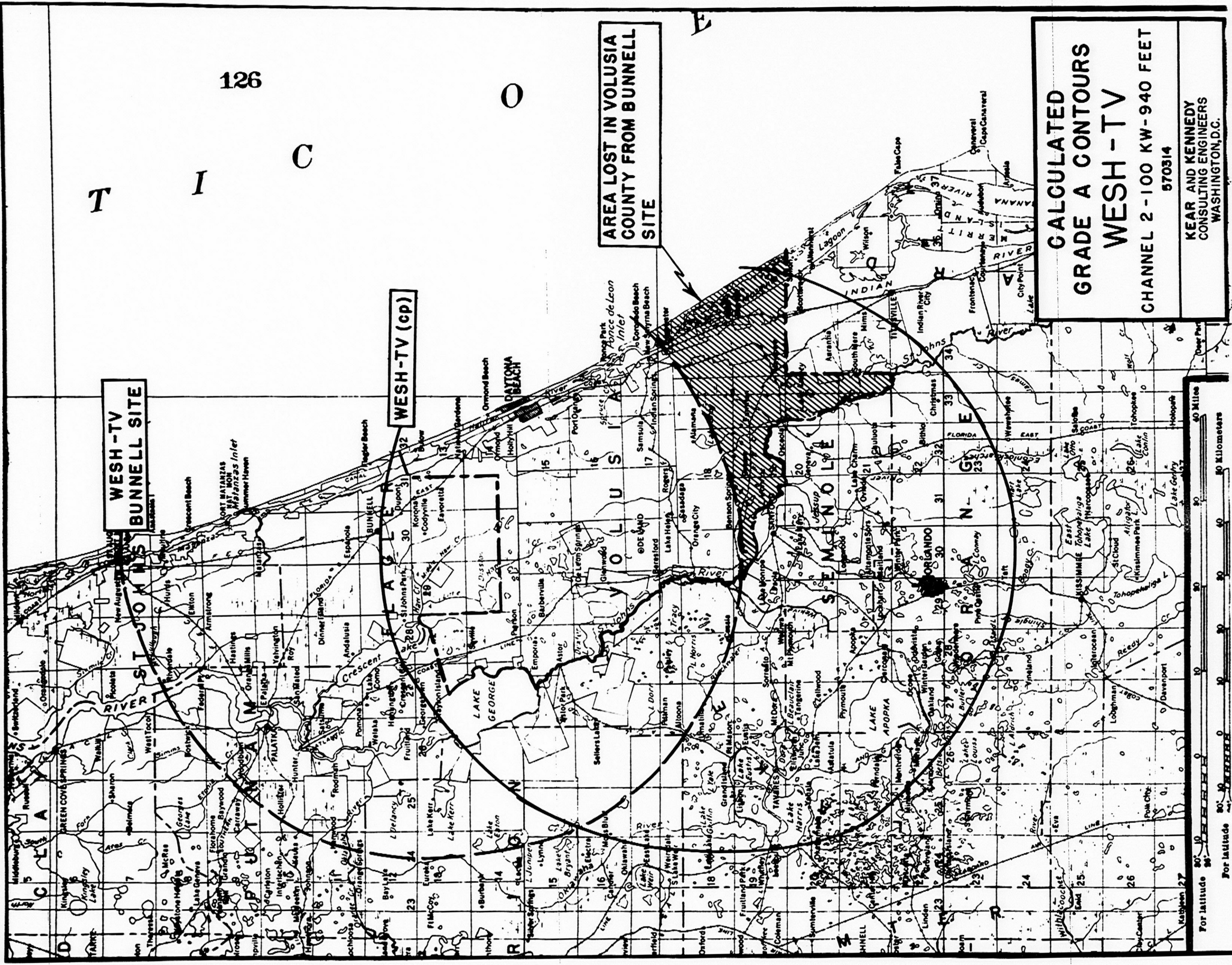
WESH-TV
BUNNELL SITE

WESH-TV (cp)

AREA LOST IN VOLUSIA
COUNTY FROM BUNNELL
SITE

CALCULATED
GRADE A CONTOURS
WESH-TV
CHANNEL 2-100 KW-940 FEET
570314

KEAR AND KENNEDY
CONSULTING ENGINEERS
WASHINGTON, D.C.



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EXHIBIT EPOPULATION AND AREA SUMMARY

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OTHER SERVICES AVAILABLE TO POPULATIONS
AND AREAS WITHIN PROPOSED AND SUGGESTED
WESH-TV SERVICE AREAS

<u>Other Services Available</u>	<u>Proposed WESH-TV</u> (Orange Site)		<u>Suggested WESH-TV</u> (Bunnell Site)	
	<u>Population</u>	<u>Area (sq. mi.)</u>	<u>Population</u>	<u>Area (sq. mi)</u>
	<u>GRADE A</u>			
0	47,508	1975	52,919	2275
1	148,739	1410	5,744	336
2	None	None	1,719	49
	<u>GRADE B</u>			
0	25,719	750	24,174	698
1	212,680	5175	211,409	3762
2	44,024	1712	59,671	1798

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Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington 25, D. C.

In re Application of

 TELRAD, INC. (WESH-TV)
 DAYTONA BEACH, FLORIDA

 For Modification of Construction
 Permit to Move Transmitter (Channel 2)
 in Direction of Orlando, Increase ERP
 From 1.26 KW to 100 KW Visual and
 From .759 KW to 60.3 KW Aural, and
 Increase Antenna Height from 320 to
 940 feet.

Granted February 6, 1957

File No. BMPCT-4150

[Received Mar 26, 1957]

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REPLY BY PROTESTANTS TO
OPPOSITION TO JOINT PROTEST AND
PETITION FOR RECONSIDERATION

Come now the protestants in the above-styled docket, by their attorneys, and reply to the Opposition To Joint Protest And Petition For Reconsideration filed by Telrad, Inc. in this matter on March 18, 1957. In support of their reply, these protestants state:

1. The opposition filed by Telrad, Inc., (hereinafter sometimes referred to as "Telrad" or "WESH-TV") in the main, supports the factual allegations contained in the protest filed by protestants in this proceeding. The opposition also fails to answer or oppose many allegations contained in the protest, as will hereinafter be set forth. Telrad deals principally with the merits of the questions presented by the protest which are not before the Commission at this time; and fails to answer the questions which are presently at issue before the Commission and must now be determined by the Commission as a result of the filing of this protest. These are:

A. The jurisdictional question, that is, whether the protest meets the requirements of Section 309(c) of the Communications Act of 1934, as amended;

B. The form of hearing to be held as a result of the protest, that is, oral argument or evidentiary hearing; and

C. The issuance of a stay postponing the effective date of the grant as a result of the findings by the Commission as required by Section 309(c).

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A. The Protest Is Sufficient And
Meets The Requirement Of Section 309(c).

2. Telrad makes the claim that the protest is defective because it fails to make proper allegations. This claim, however, borders on the frivolous. Telrad devotes four paragraphs (Opp., Pars. 21, 22, 23 & 24) to the jurisdictional question, but only Paragraph 21 deals directly therewith. Paragraphs 23, 24 and 25 are addressed to the

type of hearing to which protestants are entitled. There is not a single reference in Paragraph 21 to any allegation or fact set forth by protestants that fails to meet the requirements of Section 309(c). In Paragraphs 23, 24 and 25, Telrad does not refer to a single allegation or fact in the protest which is phrased generally or fails to meet the requirements of Section 309(c). These tacit admissions of Telrad therefore substantiate the position of these protestants as to the sufficiency of their protest and that it does meet the requirements of Section 309(c). Telrad's mere characterization of the allegations of protestants can in nowise change the basic facts, allegations, and statements contained in the protest. The Commission, therefore, must make findings that the protest is sufficient in meeting the requirements of Section 309(c) of the Act.

B. An Evidentiary Hearing Is Required
In This Proceeding. An Oral Argument
Will Not Suffice.

3. Telrad, in Paragraphs 23 and 24, would have the Commission erroneously find and conclude that an oral argument would suffice and that an evidentiary hearing is not required in this proceeding. Telrad likewise, in Paragraphs 1 thru 10, inclusive, deals with the merits of the questions presented by the protest, evidently in its effort to have the Commission render an erroneous conclusion as to the type of hearing to be held and stating, in effect, that an evidentiary hearing is not required in this proceeding. Telrad relies at length upon presenting certain facts heretofore unavailable and, in addition, relies upon the case of Gulf Television, 12 RR 447, citing it in several places throughout its answer. Telrad, however, forgets that the decision in the Gulf Television Case was rendered after a full evidentiary hearing and an extensive record which afforded a determination of the factual questions presented was held in that case.

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4. The language of Section 309(c) of the Act is clear as to the duty of the Commission. The Commission must hold an evidentiary

hearing when the protest meets the requirements of the Act, unless it finds, in its decision, that, even if all the alleged facts were proven true, no grounds existed for setting aside the grant. This language simply means that, in order to dispense with an evidentiary hearing and dispose of the case by oral argument, no questions affecting the public interest have been presented by a protestant and all the facts alleged in the protest are assumed to be true. Such is not the situation in the instant proceeding. On the contrary, numerous questions of law and fact vitally affecting the public interest have been raised which, when properly considered by the Commission, can and should cause the Commission to set aside the Telrad grant of February 6, 1957. Most of the allegations which substantiate protestants' allegations are not answered by Telrad.

5. Telrad has not only failed to answer certain material facts and allegations contained in the protest, but it has also soft-pedaled and equivocated its answer to other facts and allegations contained in the protest. The emphasis which Telrad has placed upon the programming it has provided for Daytona Beach public service organizations and others and its promise to continue such programming in nowise answers the allegations of fact in the protest that Station WESH-TV will become an Orlando market station; that its additional investment and coverage calls for higher rates; that the station will therefore price itself out of the Daytona Beach market and have resulting serious economic effects on the Daytona Beach merchants and advertisers.

A. Programming is one thing, while merchandising is another. In its Sixth Report and Order, the Commission found that, without the Table of TV channel assignments, many communities, which could not readily support a local television station "but eventually would

133 be able to do so, will in the absence of a fixed reservation of channels for other use, find that available frequencies have been pre-empted." The Commission thus, by its assignment table, intended that channels should be made and remain available so that the smaller communities would be able to have their own stations for the telecasting of local programs and for the use of local merchants.

b. Obviously, with this greater investment and coverage, the rates of Station WESH-TV must necessarily be increased. A merchant in Daytona Beach who is interested only in serving that immediate community and its natural economic environs would have no need for the additional coverage, including Orlando, and in most cases, would not be able to pay the increased rate for the unneeded service, even if time were available.

c. While the applicant may contend that it will continue to serve organizations and groups with public service programs from Daytona Beach, regardless of whether or not they would be of interest to the far greater percentage of the population within the enlarged service area, there is, significantly, no contention that WESH-TV will retain or establish rates which would make it possible for the Daytona Beach merchants to utilize its facilities, even though they have no need for coverage beyond the normal Daytona Beach area and its environs. In other words, while the station might continue to carry some local public service programs from Daytona Beach, it is apparent that, from the standpoint of the advertisers, it would become a regional and national outlet. Indeed, Telrad now takes for granted (Opp., Pages 7-8) that it will carry the programs of at least two networks. This is obviously done in order to appeal to national and regional advertisers who are interested in the larger areas and populations beyond Daytona Beach, particularly Orlando.

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d. The applicant contends (Opp., Page 6, Fn. 5) that WESH-TV "will continue to be competitive with other media in Daytona Beach in soliciting the support and serving the advertising needs of Daytona Beach business." There is no contention, much less a promise, that special Daytona Beach area rates will be charged and that desirable time will be made available for local merchants who only need local coverage, such as the station now offers, regardless of the demand for time by regional and national advertisers who desire the extended coverage, including Orlando, and are able and willing to pay therefor. In other

words, without a specific promise on the part of the applicant to the contrary, protestants reaffirm their allegation that through its proposed enlarged operation, WESH-TV will price itself out of the Daytona Beach market. The mere fact that the station will solicit the support of Daytona Beach business means nothing of itself.

e. Therefore, regardless of studio locations, station identification, or other niceties in compliance with the letter of the Commission's Rules, the fact remains that the station will cease to be a Daytona Beach station operated for the primary benefit of the Daytona Beach public, including its merchants, and will become a regional or "clear-channel" station whose primary interest is in Orlando and the larger area beyond the Daytona Beach community.

6. The protestants, specifically in Paragraphs 11 and 12, as well as in other paragraphs, allege that Telrad did not, in its application, make a full and complete disclosure of its intentions to operate station WESH-TV as an Orlando market station. This allegation goes to the qualifications and intentions of the applicant. The opposition of Telrad substantiates the facts set forth and the allegations made in the protest.

135 Nowhere in the opposition does Telrad deny the fact that it has not or will not secure a regular NBC or ABC television affiliation and become the Orlando outlet therefor. On the contrary, it relies upon rendering a Grade A signal throughout all of Volusia County in justification for its move (Para. 3); and in Para. 8, for the first time, tacitly admits the truth of the charges made by protestants that it, Telrad, was seeking to become the Orlando television outlet for NBC or ABC, or both. Telrad also admits that, "if the networks and national advertisers choose to treat these facilities as adequate for an Orlando market outlet," it can hardly be charged with impropriety in seeking such a network affiliation. As a matter of fact, the words Orlando, and Orlando coverage, or facilities adequate to serve the Orlando market, do not appear in any of the previously filed Telrad applications involved herein. For the first time, they appear in the form of admissions in the opposition to the protest filed by Telrad. Furthermore, Telrad has not

as yet advised the Commission, since revealing its heretofore undisclosed intention to become a regular Orlando market network outlet, what plans it has for joint programming, joint or combination rates, or other relationship with the NBC and ABC outlet station in Jacksonville (WJHP-TV) which is likewise owned and operated by the same interests which own and operate WESH-TV.

7. Telrad has not answered or in anywise refuted the facts and allegations in the protest which involve the mandatory provisions of Section 307(b) of the Act. Neither have they in anywise answered or explained the inconsistent position taken by their parent company in Docket 11361 and the statements made in their instant opposition, especially with respect to the mandate of Section 307(b) and with particular reference to the desirability and necessity of including large populations within a Grade A television contour to the north and northwest of, but within, the environs of Daytona Beach.

8. In Paragraph 14(a) of the protest, protestants alleged that the Commission's decision was erroneous in law and contrary to the statutory standard of public interest, convenience and necessity. It was pointed out that any move of Station WESH-TV in a southerly direction away from

136 Daytona Beach, that is, towards Orlando, would deprive many members of the public of the grade of service which they might normally expect from a Daytona Beach station. This was a question vitally affecting the public interest which was considered by the U.S. Court of Appeals for the District of Columbia Circuit in Wilton E. Hall and Greenville Television Company v. F.C.C., (14 RR 2009) at Page 2019. In discussing the degradation of service question, the Court stated: "The record shows the modification is a curtailment of service to the Spartanburg area which, unless outweighed by other factors, is not in the public interest. But we have no way of determining from the record whether service curtailment may be outweighed by other factors pointed toward, rather than away from, public interest. As we have said, such a question is for the Commission's consideration." Therefore, for the Commission to disregard this question, now that it has

been raised, even after evidentiary hearing, would be error. Most certainly, therefore, it cannot be disposed of by oral argument or a pre-judgment of evidence on the question and without giving these protestants their full day in court, including the right of cross-examination.

9. In Paragraph 15 of their protest, and in the engineering statement and figures attached to their protest, these protestants have demonstrated that the use of a different site for Television Station WESH-TV will better serve the public interest, convenience and necessity than will the operation of that station at the Orange City site specified by Telrad. There can be no doubt but that the protestants' proposal raises questions which vitally affect the public interest. In discussing these questions, Telrad characterizes the proposal as an administrative absurdity and monstrosity; and, of course, relies upon the time-worn principle of administrative convenience in urging that the Commission disregard the question presented by protestants' proposal. However, this question likewise has been discussed and settled by the U.S.

Court of Appeals in Beaumont Broadcasting Corporation v. Federal Communications Commission, 7 RR 2149. That case also was the result of a protest filed by Beaumont Broadcasting Corporation against a

137 grant by the Commission to Ozarks Broadcasting Company for the use of a directional antenna and increased power. At the hearing, Beaumont attempted to prove that there were one or two directional antenna systems which could afford better protection to Beaumont. The Examiner refused to hear evidence on the alternative proposal and was sustained by the Commission. When this matter came before the Court it found (Pages 2156-7): "The issue tendered by this proffer was not whether Beaumont's rather than Ozarks' antenna proposal should have been adopted. It was whether the public interest would be served by a grant to Ozarks with attendant interference when such interference might be eliminated by an antenna design not advanced by Ozarks. * * *

We also note the absence of specific notice by rule or otherwise requiring submission of Beaumont's proffered evidence in advance of hearing. Admittedly, advance submission of this technical data would

promote efficiency and expedition of administrative hearings. Nevertheless, we think that under all these circumstances, controlling weight could not be given to the desirability of efficiency and expedition in hearing procedures, thereby foreclosing consideration of factors vital to the issue of whether Ozarks' proposal is consistent with public interest." (Emphases supplied.) It is therefore clear that the issue presented by protestants in Paragraph 15 and the attached engineering exhibit presents a question which vitally affects the public interest and cannot be pre-judged, and that an evidentiary hearing in the instant case is required in order that the Commission may consider the evidence on this issue and make proper findings and determinations thereon. (See Beaumont Broadcasting Corp. v. Federal Communications Commission, 7 RR 2149, supra.)

C. The Issuance of A Stay Postponing The
Effective Date of The Grant Is Required By
Section 309(c).

10. Section 309(c) of the Act requires that a stay be issued when a protest is filed except where the interim operation is necessary to the maintenance of an existing service; or the Commission affirmatively finds that there are compelling considerations which require the new
138 service during the time that the protest is being heard. In this case, there is no question but that the existing service will continue to be maintained even though a stay be issued. Daytona Beach, which has its own station, will continue to receive television service from WESH-TV in the same manner as it is now getting such service from the applicant. As a matter of fact, the protest demonstrates, if a change in operation is permitted, Daytona Beach and its environs will lose, rather than continue to receive, a local service directed primarily to its needs and interests.

11. The only reason supplied by the applicant for the Commission to refuse to issue the stay which is normally required by the statute is the claim (Page 18) that the proposed operation would provide service to

some twenty-five thousand people who are in what is claimed to be a television service "white area". The fact is that the applicant has failed completely to demonstrate that the "white area" it claims to exist does, in fact, exist. What the applicant has done is to take the Commission's Standards which relate to coverage and not to service, and to equate the calculations of coverage with actual service. The Commission, however, has repeatedly found that it is impossible to determine the extent of service from the propagation curves except as it is demonstrated that the curves have specific applicability in the area in which the prediction is made. In this case, the applicant has failed in any way to demonstrate that the Commission's theoretical propagation curves have validity in the area involved. Having failed to make this demonstration, it has failed to establish that there is a service "white area".

12. Furthermore, the term "white area" is not defined at any place in the Commission's Rules and Regulations. This phrase is defined and applied in the AM field, because the Commission has defined in its Rules grades of service, primary or satisfactory service and minimum field strengths that are necessary to constitute satisfactory service. In the television field, however, the Commission has not determined by regulation applicable in adjudicatory proceedings what fields are necessary to constitute satisfactory television service. In the absence of a showing as to actual service rendered or to be rendered, it is preposterous for Telrad to refer to the area in question as a television "white area". Furthermore, it would be error for the Commission, in the absence of such a showing, to rely on the area in question as being a so-called television "white area" without satisfactory service. Contrary to the allegations of Telrad, recognized statistics show that there are a very substantial number of television receiving sets and households in the counties embraced in the so-called "white area" and as illustrated by the dotted area shown in Exhibit C of the engineering statement attached to the opposition. Ocala, Florida, is in this dotted area. Ocala is located in Marion County. The Grade B

contour shown on this exhibit marked "Proposed WESH-TV" approximately bisects Marion County, which has a population of 38,187 people (1950 Population Census, Volume I, Pages 10-3 - 10-9). Furthermore, of the total households (12,800), 37% (4,740) have television receiving sets. (Television Factbook No. 24, Page 28.) Levy County, Florida, is to the west of Marion County and the Grade B contour proposed by WESH-TV does not encompass any portion of this County. Levy County, however, has a population of 10,637 people (1950 Census, Volume I, Pages 10-3 - 10-9.) Of the 2,600 households in that County, 860 (33%) have television receiving sets. (Television Factbook No. 24, Page 28.) Thus, it is clear that the area in question does receive television service and that Telrad's statements are fully refuted. In the absense of a clear demonstration that a significant number of persons would be without a television service except if Telrad operates as proposed, the Commission is unable to make the statutory affirmative findings that the public interest requires that the operation contemplated by the applicant be authorized pending the protest hearing. Under these circumstances, a stay must be issued.

WHEREFORE, it is respectfully prayed that the Commission:

1. Designate the above-entitled application of Telrad, Inc. for evidentiary hearing upon the issues set forth in the protest;

2. Adopt the issues specified in the protest, make the protestants parties to the proceeding, and place upon the applicant,
140 Telrad, Inc., both the burden of proceeding with the introduction of evidence and the burden of proof;

3. Postpone and stay the effective date of the Commission's action to the effective date of the Commission's final decision after the evidentiary hearing upon the above-entitled application for the reason that the instant authorization is not necessary to the maintenance and conduct of an existing service and there is no basis for an affirmative finding that the public interest requires that the grant remain in effect;

4. Finally deny, after a full and complete evidentiary hearing, the instant application of Telrad, Inc.; and

5. Grant such other and further relief as the circumstances may warrant and the public interest may require.

Respectfully submitted,

ORLANDO BROADCASTING COMPANY, INC.

Geo. O. Sutton,
Edwin J. Schafer,
Its Attorneys
National Press Building
Washington 4, D. C.

/s/ By Geo. O. Sutton

MID-FLORIDA RADIO CORP.

and

MID-FLORIDA TELEVISION CORP.

Paul Dobin,
Their Attorney
Cafritz Building
Washington 6, D. C.

/s/ By Paul Dobin

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CENTRAL FLORIDA BROADCASTING COMPANY

Eliot C. Lovett

and

Their Attorney

WORZ, INC.

734 Fifteenth St., N. W. * * *

/s/ By Eliot C. Lovett - March 25, 1957.
[Certificate of Service]

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

FCC 57 - 331
42995

In re Application of

TEL RAD, INC. (WESH-TV)

Daytona Beach, Florida

For Modification of Construction Permit

)
)
) Docket No. 22975

) File No. BMPCT-4150
)
)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Doerfer and Mack not participating.

1. The Commission has before it for consideration a "Joint Protest and Petition for Reconsideration" filed on March 8, 1957, by Orlando Broadcasting Company, Inc., licensee of Radio Broadcast Stations WDBO-FM and Television Broadcast Station WDBO-TV, Orlando, Florida, Mid-Florida Radio Corporation, licensee of Radio Broadcast Station WLOF, Orlando, Florida, Central Florida Broadcasting Company, licensee of Radio Broadcast Stations WKIS and WKIS-FM, Orlando, Florida, and Mid-Florida Television Corporation and WORZ, Inc., competing applicants for a new television broadcast station to be operated on Channel 9, in Orlando, Florida, pursuant to Sections 309(c) and 405 of the Communications Act of 1934, as amended, directed against the Commission's action of February 6, 1957, granting the above-captioned application of Telrad, Inc., (WESH-TV) for authority to change the transmitter location of Station WESH-TV, Daytona Beach, Florida, and to make other changes; an "Opposition to Joint Protest and Petition for Reconsideration" filed on March 18, 1957, by Telrad, Inc., and a "Reply By Protestants to Opposition to Joint Protest and Petition for Reconsideration", filed on March 25, 1957.¹

2. Mid-Florida Television Corporation and WORZ, Inc., claim standing as "parties in interest" and as "persons aggrieved or whose interests are adversely affected" within the meaning of Section 309(c) and 405 of the Communications Act of 1934, as amended, by virtue of their status as competing applicants for Channel 9 in Orlando, Florida. WORZ, Inc. also owns all of the capital stock of Central Florida Broadcasting Company, and the principals of Mid-Florida Radio Corporation own 100% of Mid-Florida Television Corporation. The remaining protestants claim standing as the licensees of standard broadcast stations in Orlando

¹ Protestants' reply, in substance, consists of a general denial of the matters alleged by Telrad, Inc., in its opposition.

and, additionally, in the case of Orlando Broadcasting Company, as the licensee of Television Station WDBO-TV.

143 3. In support of their protest, protestants allege, in substance, that the subject application is almost identical in nature with an application filed in 1955 (BMPCT-2846) by the prior owners of Station WESH-TV; that the Commission by letter dated August 31, 1955, raised the question as to whether that proposal was designed to serve the particular needs of Daytona Beach, and that failure to raise the same questions with respect to the instant application deprived protestants of their statutory rights under Section 309 of the Act. Protestants also allege that the statutory rights of certain members of the public have been disregarded with respect to service, programming and advertising, because advertisers located in Daytona Beach will be required to pay a higher rate, inasmuch as WESH-TV will, in fact, be an Orlando station, whose programs will be designed to serve that city; and that WESH-TV has the will and the intention to identify itself for purposes of national, regional and local advertising as an Orlando station. In this connection, protestants state that the subject application does not disclose WESH-TV's intention to operate as an Orlando station, but, to the contrary, indicates that there will be no substantial changes in programming from that proposed in the application for transfer of control.² Protestants aver on information and belief, that WESH-TV plans to secure a regular NBC affiliation, if it has not already done so, and to serve as the regular Orlando television outlet for NBC; and that such plans have not been disclosed to the Commission. It is protestants' position that in assigning television channels to the cities of Daytona Beach and Orlando, the Commission recognized that they were separate and distinct communities; that the authorities (Census of Population: 1950, Page XXXVII and Table 31, pp 1-78, Rand McNally, Hagstrom, J. Walter

² On April 25, 1956, the Commission granted the application (BTC-2175) for a transfer of control of Telrad, Inc., from W. Wright Esch et al to WCOA, Inc., which owns 100% of the stock of Telrad, Inc.

Thompson market areas) recognize the same distinction; and that the efforts of WESH-TV to combine and consolidate these areas, by rendering a common television service, violate not only the Table of Assignments and the Rules with respect thereto, but also, the concepts of the Sixth Report and Order.

4. Protestants state that the Commission's action in granting the above-captioned application violates Sections 1 and 307(b) of the Communications Act in that the service proposed by WESH-TV fails to provide a Grade A television service to the area and population north of Daytona Beach along the coast and in the adjacent interior areas, which service should normally be rendered by a television station assigned to and operated in Daytona Beach. Furthermore, protestants point out that there is only one television station operating in Daytona Beach and one in Orlando, but that it can be reasonably expected that a television station will be authorized to operate on Channel 9 in Orlando in the near future. Additionally, it is pointed out that three UHF channels, including an educational channel, are assigned for use in Orlando, whereas only one UHF is assigned for use at Daytona Beach. Thus, protestants claim that, assuming future utilization of all these channels and the proposed operation of WESH-TV, the public north and northwest of Daytona Beach can expect one Grade A service, i.e., from the Daytona Beach UHF, if located properly. Therefore, protestants contend that the terms of Section 307(b) required consideration by the Commission of existing service to the public from the Orlando station

144 at the time it acted on the above-captioned application and that the said Section contemplates the rendition of a first satisfactory service, rather than degradation of that service, in order to provide a second satisfactory service for people in an area already receiving one satisfactory service. Protestants allege, therefore, that in order that the applicable provisions of the Communications Act and the Rules and Regulations of the Commission may be complied with, WESH-TV should locate its transmitter generally to the northwest of Daytona Beach rather than the southwest. Protestants propose such a site and allege

that they will prove in the requested hearing that this site will better serve the public interest.

5. In view of the foregoing, the protestants request that the Commission designate the above-captioned application for hearing upon twelve specific issues; adopt such issues; make the protestants parties to the proceeding; place upon the applicant both the burden of proceeding with the evidence and the burden of proof; and grant such other relief as the circumstances may warrant and the public interest may require. In addition, the protestants request that the effective date of the Commission's action be postponed to the effective date of the final decision after hearing. In support of this request, the protestants urge that the grant is not necessary to the maintenance and conduct of an existing service, and that there is no basis for an affirmative finding that the public interest requires that the grant remain in effect.

6. On March 18, 1957, WESH-TV, filed an "Opposition to Joint Protest and Petition for Reconsideration". In its opposition WESH-TV asserts that the protest fails to meet the statutory test of Section 309(c), in that the allegations are speculative in nature; that the protestants have not stated "facts and matters" with sufficient particularity; that, in view of its announced intention to operate as a Daytona Beach station, protestants are factually in error in assuming that WESH-TV is to be an Orlando station; and that the fact that WESH-TV may secure the NBC affiliation for the Orlando market is not inimical to the public interest and is consistent with its plans as set forth in the transfer application (see footnote 2). With respect to the protestants' request for a comparison of WESH-TV's proposed transmitter site and a hypothetical site selected by the protestants, WESH-TV urges that there is no basis in the Communications Act or the Commission's Rules for requiring such a comparison. WESH-TV argues, finally, that, at most, oral argument rather than an evidentiary hearing is warranted, because all of the matters raised are basically attributable to the desire of the protestants to protect themselves from competition, and because no allegations have been made which challenge the correctness of the Commission's action.

7. With respect to the protestants' request that the Commission stay the effective date of the grant, WESH-TV alleges and, in support thereof, attaches an engineering affidavit showing that a substantial area around Ocala, Florida, containing some 25,719 persons, will receive the first and only Grade B service from the proposed WESH-TV facilities; that, in addition to this "white" area, there is a substantial "gray" area, containing approximately 212,680 persons who would receive their first choice of service from WESH-TV, inasmuch as they are now within the Grade B contour of one existing station; that approximately 47,508 persons would receive a first Grade A service from WESH-TV; and that the entire remaining area within the proposed WESH-TV Grade A contour for the first time would be afforded a choice of service. Furthermore,

145 Telrad alleges that all of Volusia County, within which Daytona Beach is located, would be provided with a Grade A service; that within a greater part of WESH-TV's new service area, only Stations WDBO-TV, Orlando and WMBR-TV, Jacksonville, now provide service and that these stations are predominantly CBS outlets; that WESH-TV will provide, for the first time, a choice of NBC and/or ABC programs and that the need for effective competition among stations as network outlets is obvious. Additionally, WESH-TV points out that due to its present limited coverage it has been unable to provide regular network service to Daytona Beach and that the only other service to Daytona Beach is received from WDBO-TV, Orlando, which places only a Grade B signal in the city. Therefore, WESH-TV asserts that the Commission must find that the public interest requires that the grant remain in effect.

8. In view of the facts that Orlando Broadcasting Company, Inc., Mid-Florida Radio Corporation and Central Florida Broadcasting Company are licensees of Stations WDBO-AM, FM & TV, WLOF and WKIS and WKIS-FM, respectively, and that they have alleged that as a result of the grant of the above-captioned application they will be in direct competition for advertising revenues with WESH-TV and will suffer economic injury, we find them to be "parties in interest" and "persons aggrieved or whose interests are adversely affected" within the meaning

of Sections 309(c) and 405 of the Communications Act of 1934, as amended. In re T. E. Allen and Sons, Inc., 9 Pike & Fischer RR 197; F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470 (9 Pike & Fischer RR 2008). With respect to Mid-Florida Television Corporation and WORZ, Inc., the Commission is of the view that they cannot properly claim standing under Sections 309(c) and 405 of the Communications Act to protest or request reconsideration of the grant in question as mere applicants for Channel 9 in Orlando. Central City-Greenville Broadcasting Company (WMTA) 11 Pike & Fischer RR 484. We find, further, that the protestants have specified with particularity, within the meaning of Section 309(c), sufficient facts upon which they rely in support of the protest, except with respect to the following issues:

(g) To determine whether the needs of those areas and populations in the Daytona Beach area currently without a Grade A service should be subverted to the needs of those that currently receive a Grade A signal from Station WDBO-TV and would receive a second Grade A signal if operation of Station WESH-TV should commence as Telrad has proposed.

(h) To determine whether the needs of the populations and areas to be served by the instant Telrad proposal are superior to the needs of those populations and areas which would receive service should operation of Television Broadcast Station WESH-TV commence as proposed by the protestants herein.

In effect, both of these issues request a comparison between the areas and populations to be served by the proposed WESH-TV operation and the areas and populations which would be served from a hypothetical site proposed by the protestants. We find no basis in the Communications Act, our Rules or in past decisions, for such a comparison and consequently these issues must be rejected. Accordingly, the Commission is designating the application for evidentiary hearing on the issues specified by the protestants with the exception of the issues set forth herein above. Protestants request that the burden of proceeding with

the introduction of evidence and the burden of proof be placed on the applicant; however, they have made no showing in support of this request and, accordingly, the Commission is not adopting the issues and the burdens with respect to each of the issues will be on the protestants.

146 9. The protestants have requested that the effective date of the grant of the application in question be postponed until a decision in this matter after hearing. Section 309(c) provides in pertinent part that " . . . the effective date of the Commission's action to which protest is made shall be postponed, unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing." In amending Section 309(c), the Congress indicated that the Commission in exercising its discretion should consider two factors -- the need for the new service and the likelihood that the grant in question would ultimately have to be set aside.³

10. We are of the view that there is need for the proposed new service. Operating as proposed, WESH-TV will bring a first Grade B service to approximately 25,000 persons and a second Grade B service to an estimated 212,000 persons. In addition, approximately 47,000 persons will receive a first Grade A service as a result of the proposed operation. Furthermore, since WESH-TV proposes NBC and/or ABC network programs viewers would, for the first time, have a choice of live network programs. In view of this, it appears that the proposed operation would fulfill a significant need by providing a first or second service to a large number of people.

11. We have, as required by revised Section 309(c), balanced this need of the Daytona Beach area for new television service against

³ See Pike & Fischer 1 RR 10:373, Senate Report accompanying H.R. 5614 amending Section 309(c).

the likelihood that the grant in question will have to be set aside after the hearing here ordered. And, while we cannot now state what our conclusions will be in the light of the hearing record, we do not believe, on the basis of the pleadings, that protestants have made a prima facie case that the grant is not in the public interest.

12. In light of the foregoing, we affirmatively find the public interest requires that the grant remain in effect; and accordingly, the effective date of the Commission's action here in question will not be postponed.

13. In view of the foregoing, IT IS ORDERED, that the subject protest IS GRANTED with respect to Orlando Broadcasting Company, Inc., Mid-Florida Radio Corporation and Central Florida Broadcasting Company, and IS DENIED with respect to Mid-Florida Television Corporation and WORZ, Inc.; That the request for stay IS DENIED; That the Petition for Reconsideration IS GRANTED to the extent provided for below and IS DENIED in all other respects; and that, pursuant to Section 309(c) of the Communications Act of 1934, as amended, the above-captioned application is designated for hearing at the offices of the Commission in Washington, D. C. on the following issues:

147 (1) To determine whether, in view of the circumstances of this case, the purpose of the proposed move of the transmitter locations and the change in operating facilities of Station WESH-TV is to provide an additional television broadcast service to Orlando and its surrounding area in derogation of the Commission's allocation policies and rules, particularly Sections 3.606 and 3.607 thereof.

 (2) To determine the programming plans of the applicant, especially in relation to the representations made to the Commission, and to determine whether there has been a full and frank disclosure thereof.

 (3) To determine whether the grant of the instant application is consistent with and will further the objectives of the provisions of Section 307(b) of the Communications Act of 1934, as amended.

(4) To determine whether the grant of the instant application is consistent with and will further the objectives of the provisions of Sections 3.606 and 3.607 of the Commission's Rules.

(5) To determine whether the applicant's proposed use of the channel assignment is consistent with and will further the objectives of the provisions of Sections 3.606 and 3.607 of the Commission's Rules.

(6) To determine whether the applicant's proposed use of the channel assignment is consistent with and will further the objectives of Section 307(b) of the Communications Act of 1934, as amended.

(7) To determine whether a full, complete, and candid disclosure has been made with regard to all of the facts and circumstances surrounding the filing and prosecution of the instant application with particular reference to a network affiliation by the applicant and all representations made to the Commission concerning network affiliation, as well as the substance of all negotiations, agreements, and understandings with the networks regarding the utilization of the facilities proposed.

(8) To determine what effect the rendition of a Grade A television service to the City of Orlando and a principal city signal to a major portion thereof will have upon the program policies and programs to be broadcast by Station WESH-TV, if operated as proposed.

(9) To determine the effect which the proposed extended coverage will have upon the availability and usefulness of the applicant's facilities to the Daytona Beach public and its environs.

(10) To determine, in view of the foregoing, whether the grant of the instant application is consistent with the public interest, convenience and necessity.

IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestants.

148 IT IS FURTHER ORDERED, That Orlando Broadcasting Company, Inc., Mid-Florida Radio Corporation, Central Florida Broadcasting Company and the Chief of the Broadcast Bureau are hereby parties to the proceeding herein and that:

(a) The hearing on the above issues shall commence at a time to be specified in a subsequent order, before an Examiner to be specified at a later date;

(b) The parties to the proceeding herein shall have fifteen (15) days after the issuance of the Examiner's decision to file exception thereto and seven (7) days thereafter to file replies to any such exceptions; and

(c) The appearances by the parties intending to participate shall be filed not later than April 17, 1957.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple

Ben F. Waple
Acting Secretary

Released: April 10, 1957

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

45043

In re Application of)
 TELRAD, INC. (WESH-TV))
 Daytona Beach, Florida)
 For Modification of Construction Permit)

DOCKET NO. 11975
 File No. BMPCT-4150

MOTION TO ENLARGE ISSUES

The Commission is requested to broaden the scope of the evidentiary hearing in the above-entitled proceeding by adding the following issues:

"To determine whether the needs of those areas and populations in the Daytona Beach area currently without a Grade A service should be subverted to the needs of those that currently receive a Grade A signal from Station WDBO-TV and would receive a second Grade A signal if operation of Station WESH-TV should commence as Telrad has proposed.

"To determine whether the needs of the populations and areas to be served by the instant Telrad proposal are superior to the needs of those populations and areas which would receive service should operation of Television Broadcast Station WESH-TV commence as proposed by the protestants herein. "

and by directing the parties to address themselves to the legal and policy questions raised by these issues at the oral argument on exceptions to the Examiner's Initial Decision should any be filed. The reasons for seeking this relief follow.

1. On April 10, 1957, the Commission released a Memorandum Opinion and Order granting the protests of Orlando Broadcasting Co., Inc., Mid-Florida Radio Corporation and Central Florida Broadcasting Company directed against the grant of the above-entitled application of Telrad, Inc. to change the transmitter site of Station WESH-TV, Daytona Beach, Florida, and to make other changes. In doing so, however, the Commission rejected the above quoted issues, which had been requested by the protestants, inasmuch as these issues "request a comparison

between the areas and populations to be served by the proposed WESH-TV operation and the area and populations which would be served from a

150 hypothetical site proposed by the protestants, " stating that it could find "no basis in the Communications Act, our Rules or in past decisions, for such a comparison. " The other issues sought by protestants, however, were set down for evidentiary hearing. The Commission also refused to stay the effective date of the grant to Telrad, Inc. (WESH-TV).

2. The protestants appealed the Commission's refusal to stay the effective date of the modification grant to Telrad and urged that the failure to afford them, at the least, an oral argument on the two noted issues constituted error, and that the error affected the public interest determination made by the Commission on the question of postponing the effective date of the grant. On May 7, 1957, the Court issued an order, stating in pertinent part -

" . . . it is ORDERED by the Court that insofar as the Memorandum Opinion and Order of the FCC released April 16, 1957, refuses to stay the effective date of authority granted by the Commission to intervenor, Telrad, Inc., to modify its transmitter power and location said order be, and it is hereby, stayed pending hearing and disposition of this appeal, provided, however, that upon notice to this Court by the Commission that the Commission has afforded appellants an opportunity for oral argument, pursuant to Section 309(c) of the Communications Act of 1934, as amended, on the two issues proposed by appellants and discussed by the Commission in paragraph 8 of said Memorandum Opinion and Order, the Court will reconsider its disposition of the motion for a stay. "

3. In view of the action of the Court of Appeals, the Commission is requested to enlarge the hearing issues as noted above, so that evidence may be offered thereunder in the hearing which is currently in progress. While it is recognized that the Commission has reservations

concerning the materiality of the question raised by these issues, it can preserve this question by requiring the parties to address themselves to the questions of law and policy raised by these issues at the oral argument before the Commission en banc which will be held if exceptions are filed to the Examiner's Initial Decision.

151 4. As an alternative, the Commission could set the issues for oral argument either forthwith, on the legal and policy questions raised thereby, or provide for such argument to be held along with the oral argument on exceptions to the Initial Decision of the Examiner.

5. Inasmuch as the protestants urged upon the Court that the error in failing to afford them at least oral argument on the two noted issues affected the public interest determination on the question of postponing the effective date of the grant, we believe that the Commission (irrespective of which of the suggested procedures it may decide to adopt) should expressly decide whether the inclusion of these issues either in the evidentiary hearing or in an oral argument in any way affects its previous action refusing to stay construction. We do not believe it should. The facts concerning the coverage and service to be provided by the applicant's proposal could not possibly be altered by the inclusion of the issues; nor do we believe the inclusion of the issues enhances the protestants' likelihood of success on the merits. The case of Beaumont Broadcasting Corporation v. Federal Communications Commission, 202 F. 2d 306, upon which protestants relied in their appeals as authority for the inclusion of issues with respect to an alternative transmitter site, does not contravene the Commission's policy of refusing to consider alternative frequencies or transmitter locations. See Dorsey Eugene Newman, 12 Pike & Fischer RR 211, 217-218, affirmed sub nom. Radio Atlanta, Inc. v. Federal Communications Commission, 14 Pike & Fischer RR 2070.

152 For the foregoing reasons it is respectfully requested that the

issues in the instant proceeding be enlarged in the manner requested above.

Respectfully submitted,

/s/ Robert J. Ramson

for Edward F. Kennehan
Chief, Broadcast Bureau

/s/ David I. Kraushaar
Attorney

May 9, 1957

Federal Communications Commission

153 [CERTIFICATE OF SERVICE]

154 [Received May 13, 1957]

PETITION FOR EMERGENCY RELIEF

Comes now TELRAD, INC., owner and operator of Station WESH-TV (Channel 2), Daytona Beach, Florida, and holder of a construction permit (BMPCT-4150) for an increase in power, change in transmitter location and other changes, which construction permit was granted in the instant proceedings, and, by its attorneys, respectfully requests that the Commission immediately adopt an order affording the protestants in this proceeding an opportunity for oral argument, pursuant to Section 309(c) of the Communications Act of 1934, as amended, on the two issues proposed by the protestants and discussed by the Commission in paragraph 8 of its Memorandum Opinion and Order released April 16, 1957 in this proceeding, and upon the adoption of said order forthwith to give notice thereof to the United States Court of Appeals for the District of Columbia Circuit. In support of this petition, it is respectfully submitted that:

1. On April 16, 1957, by Memorandum Opinion and Order disposing of a protest filed by Orlando stations against the aforesaid WESH-TV construction permit (BMPCT-4150), the Commission ordered an

evidentiary hearing on said application to be heard on nine of eleven issues specified by the protestants. Specification of the other two issues was
 155 refused.^{1/} In the same Memorandum Opinion and Order, as provided by Section 309(c), the Commission entered an affirmative finding that public interest required that the grant remain in effect.

2. From the latter determination, the Orlando protestants filed an appeal under Section 402(b) of the Act with the United States Court of Appeals for the District of Columbia Circuit, alleging, among other specifications of errors that the Commission "erroneously rejected, without oral argument or other process, two issues which, under a decision of this Court, the Commission was required to consider in connection with its disposition of the merits of the Protest".

3. Concurrent with the filing of said appeal, the appellants filed a motion for stay and for interlocutory injunction which motion was argued before the Court on May 2nd. On May 7th the Court (Wilbur K. Miller, Washington and Burger, Circuit Judges) entered the following order:

"Upon consideration whereof it is ORDERED by the Court that insofar as the memorandum opinion and order of the Federal Communications Commission released April 16, 1957, refuses to stay the effective date of authority granted by the Commission to intervenor, Telrad, Inc., to modify its transmitter power and location said order be, and it is hereby, stayed pending hearing and disposition of this appeal, provided, however, that upon notice to this Court by the Commission that the Commission has afforded appellants an opportunity for oral

^{1/} "(g) To determine whether the needs of those areas and populations in the Daytona Beach area currently without a Grade A service should be subverted to the needs of those that currently receive a Grade A signal from Station WDBO-TV and would receive a second Grade A signal if operation of Station WESH-TV should commence as Telrad has proposed.

"(n) To determine whether the needs of the populations and areas to be served by the instant Telrad proposal are superior to the needs of those populations and areas which would receive service should operation of Television Broadcast Station WESH-TV commence as proposed by the protestants herein."

156 argument, pursuant to Section 309(c) of the Communications Act of 1934, as amended, on the two issues proposed by appellants and discussed by the Commission in paragraph eight of said memorandum opinion and order, the Court will reconsider its disposition of the motion for a stay."

4. Pursuant to the aforesaid order, applicant WESH-TV ordered a termination of all work then in progress to construct the facilities authorized by the aforesaid Commission construction permit. There is attached hereto and submitted herewith the affidavit of T. S. Gilchrist, Jr., applicant's Vice-President and General Manager, describing the effect of said stay order in disrupting applicant's construction schedules and consequent delays that will inevitably result in the inauguration of the new service which the Commission affirmatively found was required in the public interest. Said affidavit further shows the financial obligations, expenditures and commitments of the applicant which could result in serious financial loss to the applicant unless relief from the aforesaid stay is immediately forthcoming.

5. In view of the foregoing circumstances in the light of the pleadings previously filed with this Commission and in the light further of the Court's order, it is urgently requested that the Commission take immediate action, consistently with the above-quoted order of the Court, so as to afford the Orlando protestants an opportunity for oral argument on the following issues:

(1) To determine whether the needs of those areas and populations in the Daytona Beach area currently without a Grade A service should be subverted to the needs of those that currently receive a Grade A signal from Station WDBO-TV and would receive a second Grade A signal if operation of Station WESH-TV should commence as Telrad has proposed.

157 (2) To determine whether the needs of the populations and areas to be served by the instant Telrad proposal are superior to the needs of those populations and areas which would receive service should operation of Television Broadcast Station WESH-TV commence as proposed by the

protestants herein.

fix an early date and time for said oral argument within a reasonable time after said notice; and forthwith give notice to the Court of Appeals of said action.

Respectfully submitted,

TELRAD, INC.

By Dempsey and Koplovitz
Its Attorneys
938 Bowen Building
Washington 5, D. C.

By William C. Koplovitz
Frederick H. Walton, Jr.

Attachment
May 9, 1957

158

AFFIDAVIT

District of Columbia) ss

Before me this day personally appeared T. S. Gilchrist, Jr., who, being first duly sworn, deposes and says:

Telrad, Inc. has been in the process of constructing the new facilities in accordance with the current construction permit and has already spent or committed itself to spend approximately \$300,000 in connection with such construction.

It has made a contract with the Kline Iron and Steel Company of Columbia, South Carolina for the fabrication and erection of a tower at a cost of \$76,500 of which \$12,500 has already been paid. Another \$12,500 will be due upon delivery of the tower at the site.

Telrad has also incurred approximately \$3,000 indebtedness to a local contractor for land clearing and owes an amount, as yet unascertained, to civil engineering firms for soil test drilling at the antenna site, for land profiles and survey work which has been performed.

In addition, Telrad, Inc. has on order from RCA and Raytheon all of the major items of technical equipment necessary to complete the

construction. Payments of some \$46,000 would, in normal course, become due within the week on this equipment, the total cost of this equipment being approximately \$240,000.

Telrad, Inc. plans contemplated completion of construction and commencement of operation during the month of August, 1957. Applicant's construction schedule for the remainder of this month--suspended by virtue of the stay--includes the following:

1. Commencement (immediately but not later than week of May 13th) of drilling for water well at site preliminary to building construction.
2. Contracting for extension of power to site, necessary to construction of building.
- 159 3. Commencement of construction of transmitter building as soon as water and power are available.
4. Scheduling of equipment deliveries, including delivery of two studio cameras needed promptly to replace cameras now in use.

Each day that the construction is held up by reason of the stay of the effectiveness of the construction permit will result in a pro tanto postponement of a first television service and/or a first competitive service to a substantial number of residents in the area that would be served by this station.

/s/ F. S. Gilchrist, Jr.

[JURAT]

My commission expires January 31, 1958.

161

[Received May 21, 1957]

STATEMENT OF PROTESTANTS WITH
RESPECT TO PETITION FOR EMERGENCY
RELIEF AND MOTION TO ENLARGE ISSUES

Protestants in the above entitled matter respectfully submit the following statement in connection with the Petition for Emergency Relief

filed by Telrad, Inc. and the Motion to Enlarge Issues, filed by the Broadcast Bureau on May 9, 1957.

1. The Petition for Emergency Relief, filed by Telrad, Inc. and the Motion to Enlarge Issues, filed by the Broadcast Bureau come as a result of the stay order issued by the Court of Appeals for the District of Columbia, staying the effectiveness of the grant of Telrad, Inc. authorizing it to move from Daytona toward Orlando. Protestants renew their request that the Commission designate for evidentiary hearing all the issues specified in the Protest. Protestants deem it appropriate, however, to point out that neither of the aforementioned pleadings gives consideration to many of the other important matters raised on the appeal and the Petition for Stay Order which were of necessity considered by the Court in issuing the stay. On the contrary, the pleadings of Telrad, Inc. and the Broadcast Bureau carefully avoid consideration of nearly all of these questions.

2. Particularly, it should be noted that Telrad, Inc. in effect now contends that it should be permitted to continue its construction because of the expenditures which it has already made in connection with the construction of the station. It is well settled, however, that construction of a station is at the risk of a permittee when the authorization involved is under attack before the Commission or in the Courts. Telrad, Inc. had full knowledge at all times that Protestants intended to request

162 a stay from the Court of appeals in connection with this matter and in fact Protestants even requested an interlocutory stay from the Commission pending the filing of an appeal so that a situation such as exists at this time could not arise. The fact is that the information supplied in the affidavit of Mr. Gilchrist cannot in any way affect the validity of the Court's action in issuing a stay in this case.

Respectfully submitted

CENTRAL FLORIDA BROADCASTING CO.

By

Eliot C. Lovett
734 15th St., N. W.
Washington 5, D. C.
Its Attorney

MID-FLORIDA RADIO CORPORATION

BY

Paul Dobin
Cohn and Marks
317 Cafritz Bldg.
Washington 6, D. C.
Its Attorney

ORLANDO BROADCASTING COMPANY, INC.

By

George O. Sutton
National Press Bldg.
Washington 4, D. C.
Its Attorney

May 20, 1957

164

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 23rd day of May, 1957:

IT APPEARING, That on April 10, 1957 the Commission released a Memorandum Opinion and Order in the above-captioned proceeding, granting certain protests except as to two requested issues, contained therein which, in effect, seek a comparison between the areas and populations to be served by the proposed WESH-TV operation and the areas and populations which would be served from a hypothetical site proposed by the protestants; and that by said memorandum continued in effect the grant protested;

IT APPEARING, That upon appeal of that action, the United States Circuit Court of Appeals for the District of Columbia Circuit, issued an order on May 7, 1957, staying the effective date of grant of modification of construction permit to Telrad, Inc., but providing, however, that the Court will reconsider its disposition of the motion for stay upon notice to it that the appellants have been afforded an opportunity for oral argument on the two issues previously rejected by the Commission;

IT APPEARING, That in light of the aforementioned order of the Court of Appeals for the District of Columbia Circuit, it is appropriate to hear oral argument on the two issues proposed by the protestants herein to determine whether if the facts alleged were to be proven, grounds for setting aside the grant protested have been presented;

IT IS ORDERED, That oral argument on the legal and policy questions raised by the issues, as set forth hereinafter, IS SCHEDULED before the Commission en banc at 2:00 p. m. on June 7, 1957; and IT IS FURTHER ORDERED, That each of the parties hereto will be permitted twenty minutes for the presentation of argument. The issues upon which argument will be held are as follows:

165 (a) To determine whether the needs of these areas and populations in the Daytona Beach area currently without a Grade A service should be subverted to the needs of those that currently receive a Grade A signal from Station WDBO-TV and would receive a second Grade A signal if operation of Station WESH-TV should commence as Telrad has proposed.

(b) To determine whether the needs of the populations and areas to be served by the instant Telrad proposal are superior to the needs of those populations and areas which would receive service should operation of Television Broadcast Station WESH-TV commence as proposed by the protestants herein.

FEDERAL COMMUNICATIONS COMMISSION

Mary Jane Morris
Secretary

Released: May 27, 1957

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

~~Circuit~~ *United States Court of Appeals*
For the
District of Columbia Circuit

No. 13,835

FILED SEP 5 1957

MID-FLORIDA RADIO CORP.,
MID-FLORIDA TELEVISION CORPORATION, Appellant ~~CLERK~~

Joseph W. Stewart

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee
TELRAD, INC., Intervenor

ON APPEAL FROM DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

WARREN E. BAKER,
General Counsel

RICHARD A. SOLOMON,
Assistant General Counsel

HENRY GELLER,
Counsel

JOEL ROSENBLOOM,
Counsel

Federal Communications Commission
New Post Office Building
Washington 25, D. C.

STATEMENT OF QUESTIONS PRESENTED*

All parties agree that this Appeal presents the following questions:

1. Whether the Commission's affirmative finding that the public interest requires that the Telrad grant remain in effect was made without consideration of the facts brought to the attention of the Commission by protestants bearing upon this matter, and if so, whether this is reversible error.
2. Whether the Commission, in refusing to stay the Telrad grant, could properly find that protestants had not made a prima facie case that the Telrad grant is not in the public interest
 - (a) Where the Commission, in connection with an earlier proposal to move Station WESH-TV filed by Telrad, Inc. when it was under different ownership, had advised Telrad that the Commission was unable to determine that a grant of said earlier proposal would be in the public interest, and this earlier action of the Commission was disregarded in the Commission's decision; and
 - (b) if the Commission's decision failed to consider the probability of protestants' success as a result of the possible inclusion of two

(i)

* The questions presented, as here set forth, were agreed to among the parties in a Stipulation approved by order of this Court issued June 3, 1957.

issues in the proceedings which had originally
been excluded without affording protestants
an opportunity for oral argument.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,835

MID-FLORIDA RADIO CORP.,
MID-FLORIDA TELEVISION CORPORATION, Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

TELRAD, INC., Intervenor

ON APPEAL FROM DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT AS TO JURISDICTION

Appellant, Mid-Florida Radio Corporation, claims standing to appeal as the licensee of a competing Orlando standard broadcast station, and we agree that under Sanders (Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 477), Mid-Florida Radio has standing to raise all the questions properly before the Court in this appeal. But we do not agree that appellant Mid-Florida Television Corporation has standing to seek review of the Commission's action refusing to stay the grant of Telrad, Inc.

Mid-Florida Television claimed both standing to protest the Commission's grant under Section 309(c) of the Communi-

cations Act and standing to seek review here on the ground that it was one of two applicants for a construction permit for a new television station to operate on Channel 9 in Orlando, Florida. It is well established, however, that an applicant lacks standing to protest or appeal Commission actions which do not affect the likelihood of his application being granted. Mansfield Journal Co. v. Federal Communications Commission, 84 U.S. App. D.C. 341, 173 F.2d 646; Pittsburgh Radio Supply House v. Federal Communications Commission, 69 U.S. App. D.C. 22, 98 F.2d 303. It follows that the Commission correctly determined Mid-Florida television lacked standing to protest (R. 145) and that it lacks standing here.

Appellant Mid-Florida Television appears to argue (App. Br. 3, note 2; 16, note 7) that because the Commission, a substantial period after the institution of this appeal, issued a final order awarding Channel 9 to Mid-Florida Television any jurisdictional defect existing at the time the appeal was filed has been cured. But this Court has squarely ruled upon this point, and ruled against the position taken by appellant. In KFAB Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 160, 162, 177 F.2d 40, 42, the Court stated:

"We also conclude that a person not aggrieved or affected by an order when it is entered, does not become aggrieved or affected by that order, within the meaning of this statute, upon the happening of some subsequent event which changes his status. This appeal must, therefore, be dismissed."

Further, if appellant Mid-Florida Television could correct its otherwise defective appeal by reliance on events occurring after

the 30-day period specified in Section 402(c) as the period within which any appeal must be taken in 402(b) cases, the sound policy embodied in the statutory time requirement would be thwarted.^{1/}

COUNTERSTATEMENT OF THE CASE

In view of the argumentative character of appellants' Statement of the Case, it is believed that a brief, unargumentative statement of the relevant facts would be of assistance to the Court.

On February 6, 1957, the Commission granted without hearing the application of intervenor Telrad, Inc. (Telrad) to modify its construction permit for a television station on Channel 2, Daytona Beach, Florida. Under the terms of the original construction permit, Telrad was operating Station WESH-TV with its transmitter located approximately one-half mile from the center of Daytona, Beach, an antenna height of 320 feet and a power of 1.26 kw. The modified construction permit granted on February 6, 1957, authorized Telrad to move its transmitter about twenty-five miles in the direction of Orlando (which is fifty-one miles away) to a spot near the county seat of the county in which Daytona Beach is located, to increase its power from 1.26 to 100 kw, and to increase its antenna height from 320 to 940 feet. It is conceded that operating as proposed,

^{1/} Thus, no amendment correcting a jurisdictional defect in the appeal will be permitted after the 30-day period. See Order of the Court, dated May 7, 1956, denying the appellant's "Motion for a Declaratory Ruling, or for Leave to Amend Notice of Appeal" in RCA Communications, Inc. v. Federal Communications Commission, Case No. 13,025.

Telrad will place a stronger signal over all areas it presently serves as well as extending its service to new areas.

On March 8, 1957, appellants and certain other persons not presently parties to this appeal filed a joint protest and petition for reconsideration of the grant to Telrad. Telrad, on March 18, 1957, filed an opposition to the joint protest in which it urged, inter alia, that if an evidentiary hearing or oral argument were to be held, the Commission should not stay the effectiveness of the grant of modification. In support, it stated that its proposal would provide a first Grade B television service to approximately 25,000 persons, a second Grade B service to about 212,000 persons, a first Grade A service to roughly 45,000 people, and, since it would make possible Telrad securing network programs, would bring to most of its viewers, for the first time, a choice of live programs from more than one television network (R. 88-91).^{2/}

On March 25, 1957, the protestants (including appellants) filed a joint reply to the Telrad opposition. On the question of staying the grant, appellants urged that, as the Commission's propagation curves (on the basis of which Telrad calculated the effect of its proposed move upon the service it would render) were "theoretical", it was incumbent upon Telrad "... to demonstrate that the Commission's theoretical propagation

^{2/} At no point does the Telrad opposition claim, as stated on p. 8 of appellant's Statement of the Case, that the area without any Grade B service is "... presently ... receiving no television service".

curves have validity in the area involved," (R. 138). Appellants took the further position that the area alleged to be without a Grade B service was actually receiving television service, since industry sources indicated that about 37% of the households within that area already possessed television sets (R. 138-139).^{3/}

On April 10, 1957, the Commission issued a Memorandum Opinion and Order granting the joint protest, designating it for evidentiary hearing on all but two of the issues requested by the protestants, and refusing to stay the effectiveness of the grant to Telrad. As to the latter determination, the Commission, after balancing the need for the new service proposed by Telrad against the likelihood that the grant would have to be set aside after the protest hearing, found that the public interest required that the grant remain in effect. This appeal is prosecuted from that portion of the Commission's Memorandum Opinion and Order of April 10, 1957, which refuses to stay the effectiveness of the February 6, 1957 grant to Telrad.

On May 7, 1957, this Court granted appellants' motion for an order staying the Commission's grant to Telrad pending disposition of this appeal, but provided that upon notice that the

^{3/} Contrary to the statement at the bottom of p. 9 of appellants' brief, the reply adduced no facts "... demonstrating that television service is presently available to all or nearly all" (emphasis added) of the 25,000 persons who, according to the Telrad opposition, would receive a first Grade B service, but only offered the above-noted evidence indicating the 37% figure.

Commission had afforded appellants an opportunity for oral argument on the two issues which it had refused to set for evidentiary hearing, the Court would reconsider its disposition of appellants' motion for stay. On May 27, 1957, the Commission granted intervenor Telrad's petition requesting that the two aforementioned issues be set for oral argument. Upon being so notified, this Court vacated its prior stay order by order of June 27, 1957.

SUMMARY OF ARGUMENT

I.

Section 309(c), as amended in 1956, vests in the Commission discretion not to postpone the effective date of a protested authorization pending conclusion of the protest hearing, where the Commission affirmatively finds, for reasons set out in its decision, that the public interest requires the grant to remain in effect. Here the Commission properly found, for reasons set out in Memorandum Opinion and Order of April 10, 1957, that the public interest did require the grant to Telrad to remain in effect.

For the Commission, first looking to the need for Telrad's service, correctly determined that Telrad's proposal would fulfill a significant need by providing a first Grade B service to 25,000 persons, a second Grade B service to 212,000 persons, a first Grade A service to 47,000 persons, and for the first time, a choice of live network programs for

viewers in Telrad's service area. Appellant has in effect, ignored all but one of these important public interest considerations, and its argument directed to the factor of first Grade B service to 25,000 persons is patently without merit. The fact that a minority (37%) of the persons in the area now receiving no Grade B service have purchased TV sets, either because of their fortunate location or in order to receive whatever submarginal signal might be available, does not mean that there is no need for a first service meeting the Commission's minimum specifications (i.e., the Grade B signal as defined in the Commission's Rules), but on the contrary, that there is, in a very real sense, a need for such service.

II.

Against this clear need of the Daytona Beach area for Telrad's proposed service, the Commission balanced the likelihood that the grant would be found after hearing to be not in the public interest. It properly concluded that appellants had not made a prima facie case, such as to outweigh the above described need.

Appellants' argument that the Commission employed the wrong standard in making its public interest evaluations founders upon consideration of both the clear and unambiguous statutory language and the legislative history of the 1956 amendment to Section 309(c). In any event, the issue here raised as to the proper standard is a complete afterthought on the part of appellants and as a result, they are precluded

from raising the issue for the first time in this Court on two separate jurisdictional counts -- (1) the failure first to present the matter to the Commission as required by Section 405 of the Communications Act, and (2) the failure to raise the question in their Notice of Appeal, as required by Section 402(c) of the Act.

Nor have appellants established that they did make out a prima facie case that the grant would have to be set aside. On the contrary, the facts, as gleaned from all the protest pleadings, are that Telrad is presently serving as a local outlet for Daytona Beach and will continue all of its local programming; that Telrad now has a main studio in Daytona Beach and will continue to have that studio, with no studio whatever in Orlando. Finally, the argument that the Commission itself had previously determined that an almost identical move by the prior owners of Telrad would not serve the public interest, ignores the completely different circumstances surrounding the two proposed moves.

ARGUMENT

Appellants attack that portion of the Commission's Memorandum Opinion and Order of April 16, 1957, which refused to postpone the effectiveness of its grant to Telrad pending resolution of the hearing to be held on appellants' protest.^{4/}

^{4/} In view of the pendency of that hearing before the Commission, no substantive question relating to the protest is ripe for review. Myers v. Bethlehem Corp., 303 U.S. 41, 50.

The Commission, in determining pursuant to the amended Section 309(c) whether the public interest required the grant to remain in effect, balanced the need for the new service against the likelihood that the grant would be set aside as a result of the protest hearing (R. 146). It found that there was a significant need in the Daytona Beach area for the new service proposed by Telrad, and that appellants, on the basis of their pleadings, had not made a prima facie case that the grant was not in the public interest, which would detract from the desirability of having the new service come into existence at the earliest possible moment (R. 146).

Appellants argue that the Commission erred in its findings as to the need and as to the likelihood of success. The ensuing discussion takes up these arguments, and demonstrates, we believe, the reasonableness of the Commission's judgment here attacked.

I. THE COMMISSION PROPERLY FOUND THAT THERE IS A SIGNIFICANT NEED FOR THE SERVICE PROPOSED BY TELRAD.

Section 309(c), as amended in 1956, 47 U.S.C. 309(c), provides that "... pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing... unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the

Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing." Pursuant to this provision, the Commission made the following findings as to the need of the public in the Daytona Beach area for Telrad's proposed service (R. 146):

We are of the view that there is need for the proposed new service. Operating as proposed, WESH-TV will be a first Grade B service to approximately 25,000 persons and a second Grade B service to an estimated 212,000 persons. In addition, approximately 47,000 persons will receive a first Grade A service as a result of the proposed operation. Furthermore, since WESH-TV proposes NBC and/or ABC network programs viewers would, for the first time, have a choice of live network programs. In view of this, it appears that the proposed operation would fulfill a significant need by providing a first or second service to a large number of people.

Appellants argue that they brought to the Commission's attention in their reply pleading (R. 139) "the existence of large numbers of television sets in the areas where it was claimed no television service existed" (App. Br. 15) -- and specifically, that "Ocala, Florida, alleged by Telrad in its Opposition to be in an area which presently receives no television service, is located in a county in which 37% of the household have television receiving sets" (App. Br. 8-9; R. 139). Appellants assert, on this basis, that the Commission's "determination that the grant to Telrad would bring a first service to a large number of people ... was erroneous" (App. Br. 15).

The primary difficulty with appellants' argument is that it completely misconstrues the Commission's finding.^{5/} The Commission did not find that the people in the area in question were then receiving no TV service of any nature whatever. It found rather that the 25,000 people in the area would, for the first time, receive a Grade B service. The Grade B service is the minimum service recognized by the Commission's rules, and is defined as being present where a quality of service acceptable to the median observer is expected to be available for at least 90% of the time at the best 50% of receiver locations at the outer limits of the service contour. See Section 3.603 of the Commission's rules, 47 C.F.R. 3.683; Sixth Report and Order, Vol. 1, part 3, Pike & Fischer, R.R. 91:627-32.^{6/}

In view of this definition of Grade B coverage, the Commission was thus not suggesting, and certainly never found, that none of these 25,000 people in the area in question were able to get any television service from some station. For, beyond the Grade B contour of any station there will be some locations (though less than 50% of the locations), where adequate signals will be received 90% of the time. There will be other

^{5/} Another difficulty is that while much of the Grade B "white area" Telrad would provide service to lies in Marion County - the county with 37% set ownership, a considerable portion of this county which is not included in this "white area", already received Grade B service or better from Orlando station WDBO-TV. This 37% figure may in large part reflect listeners in Marion County within WDBO-TV's Grade B contour.

^{6/} The better Grade A service is that provided where at least

locations in which an adequate signal will not be received 90% of the time, but will be received some lesser per cent of the time. And there will be still other locations where some sort of service can be received some of the time providing a television receiver of sufficient power with an antenna of substantially more than average height is utilized. Many viewers, because of their interest in television generally or in certain programs, will watch a submarginal signal even though it is erratic or "snowy".

In the absence of any other type of television reception, such sub-marginal service may be sufficiently attractive to a number of individuals to induce them to purchase sets or to erect high antennas and install other expensive receiving equipment in order to receive whatever service may be available. But this area will still be an area beyond that of any adequate television reception within the meaning of the Commission's rules. And, when, as here, service meeting the Commission's specifications is provided for the first time, the people living within that area will in a very real sense be provided with their first television service. The fact that some in-

6/ (Cont'd) 70% of receiver locations at the outer limits of the service contour secure a signal acceptable to the median observer at least 90% of the time. (See Section 3.683; Sixth Report and Order, Vol. 1, Part 3, Pike & Fischer, R.R. 91: 627-32.) These field intensity contours of a television station are only intended to specify "the approximate extent of coverage over average terrain in the absence of interference from other television stations." (See Commission's Rules, Section 3.683).

dividuals in the area may be willing and able to take the steps necessary to secure some minimum reception does not detract from the public interest in providing the entire area with its first adequate service. The Commission, therefore, properly concluded that "in view of this first Grade B service to 25,000 persons⁷ it appears that the proposed operation will fulfill a significant need by providing a first ... service to a large number of people."

Appellants' argument that^{the} Commission's propagation curves were shown by them to be inaccurate in this case,^{7/} is thus similarly without merit. For, this argument also rests upon the fact that over 30% of the households in Marion County have TV sets, and therefore, simply confuses any service (which might have induced the set purchases in question) with the adequate service defined by the Commission's Rules. Indeed, the "over 30%" figure, far from supporting appellants' position, actually undermines it. For if this area actually receives adequate TV signals, why should the set saturation figure be so low? The nationwide set saturation figure rose from 55.7% in 1954 to 80.3% as of July 1, 1957 and the average for Florida

^{7/} The Hall case Wilton E. Hall v. Federal Communications Commission, 99 U.S. App. D.C. 86, 237 F.2d 567) holds that the Commission's propagation curves are admissible to establish service in specific areas, and that one who asserts that the curves are inapplicable because of the alleged abnormality of the particular area has the burden of establishing that abnormality. In the face of this holding, appellant has abandoned the argument it advanced to the Commission that the propagation curves cannot be employed to delineate service in any particular area (R. 138).

in October 1956 was 63% -- yet the Marion County figure has increased only from 25% in 1954 to 32% in 1955 and finally, the 1956 37% figure pointed out by appellants.^{8/} The explanation for this marked lag in set acquisition in Marion County as against the nationwide norm (37% as compared with 80.3%) is, we believe, obvious: The people in Marion County are clearly not receiving an adequate signal and only that minority fortunately situated or willing to accept erratic, submarginal service have purchased sets.^{9/}

The fact that the grant to Telrad would provide a first Grade B service to almost 25,000 persons is only a part of the Commission's affirmative public interest finding. The Commission also relied on the following considerations: That Telrad would provide a second Grade B service to an estimated 212,000 persons, a first Grade A service to 47,000 persons,

^{8/} According to figures set out in Television Digest, Vol. 13, No. 28, July 13, 1957 (derived in turn from NBC Research and Planning), the national set saturation figure was 55.7% in 1954, 64.5% in 1955, 71.8% in 1956, 80.3% as of July 1, 1957. Broadcasting-Telecasting Magazine's 1954-55 Telecasting Yearbook (p. 85) shows a roughly 25% set saturation (2,940 TV sets) for Marion County as of August, 1954, the same figure in 1955-56 Yearbook (p. 82), and a 32% figure in the 1956-57 Yearbook (p. 76), estimated as of June, 1955.

^{9/} Presumably the service in question would be that of Station WDBO-TV, Orlando, since that station's Grade B contour comes closest to Ocala and actually covers a portion of the Marion County area (R. 125). See note 5, supra. It should be noted that this station took the air with its present height and power on July 1, 1954. The other station whose signal comes somewhat close to the area in question is Station WMBR-TV, Jacksonville, which has been operating since 1949, with last change in facilities in October, 1956.

and, for the first time, a choice of live network programs to the people in the Daytona Beach area (R. 146). Appellants do not dispute the accuracy of any of these findings. Instead, they attempt to write them out of the case by the argument, set forth in note 12, p. 29 of their brief, that "if the new Telrad operation is not required to provide a first service to a significant number of persons, the Commission's determination [not to stay] is clearly erroneous."

But this argument rests solely on appellants' bald assertion of its validity. Contrary to appellants' apparent suggestion by their reference in note 12 to their Point III, there is not the slightest support or indication in the legislative history that the Commission should exercise its discretion to permit a protested grant to go into effect only where there grant is "required to provide a first service to a significant number of persons"; in fact, the legislative indications are to the contrary.^{10/} The short answer, however,

^{10/} The House Committee was urged to amend the bill which became the 1956 revision of Section 309(c) so that it would read: "... unless the Commission affirmatively finds that the public interest imperatively requires that the grant remain in effect" (See Hearings, on H.R. 5614 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess., (hereafter cited as "House Hearings"), p. 37); the Senate Committee was similarly urged to amend the bill so that it would read: "... that the public interest imperatively and unavoidably requires that the grant remain in effect...." (See Hearings on S. 1648 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess (hereinafter cited as "Senate Hearings"), p. 80 -- emphasis added both instances). Neither committee saw fit to adopt these suggestions. Further, the Chairman of the Commission

is that statute vests discretion in the Commission to authorize protested service where "the public interest requires that the grant remain in effect", and thus provides for consideration of all public interest considerations.

We do not believe it requires any lengthy discussion to establish the importance to the public interest of these factors considered by the Commission. Thus, the policy is well established in the communications field in favor of competition and of "the widest possible dissemination of information from diverse and antagonistic sources" Associated Press v. United States, 326 U.S. 1, 20; see Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 475. It follows that the provision of a second Grade B service to over 212,000 is of great significance to the public interest judgment. For the first time, this very substantial number of persons will have a choice as to TV programming.

The public benefit from provision of a first Grade A service to 43,000 persons is also patent and cannot be sloughed off by appellants as merely "a higher grade of service" (App.

10/ (Cont'd) specifically advised the Senate Committee that, in the Commission's opinion, among the public interest considerations which could justify the refusal of a stay were "... such matters as whether the protestant's /protested/ service is necessary to provide a first or second service to substantial areas or populations." Senate Hearings, p. 33; (emphasis added). In this connection, it should be noted that the bills which became, with only slight amendment, the 1956 revision of Section 309(c) were drafted by and introduced at the request of the Commission. See Sen. Rep. No. 1231, 84th Cong., 1st Sess., 1, 6; Senate Hearings, p. 1; House Hearings, p. 1.

Br. 29). When the definition of Grade A is borne in mind,^{11/} it is clear that the many persons, in a very real sense, will be obtaining adequate television service as a result of the grant to Telrad. And, finally, throughout the entire Daytona Beach area, the people will for the first time have a choice of live network programs^{12/} (assuming that by its move, Telrad will be enabled to secure a network affiliation -- see R. 44, 46, 75-7, 90, 135). From previous cases, this Court is well aware of the popularity and importance to the listening public of network programming.

Appellants argue here and at several points (including those covered in Pt. II, infra; see App. Br. 15, 25-26, 30-1) that the Commission has not set out clearly the bases or reasons for its determination, and that such reasons cannot be supplied in this brief. But, as shown by the quoted material from the Memorandum Opinion and Order of April 10, 1957 (p. 10), the Commission did set out the grounds

^{11/} See pp. 11-12, supra. The standard criterion of service is based upon a standard instantaneous acceptance ratio of desired to undesired signals being exceeded for 90 percent of the time at any given receiver location. Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90 per cent of the time at the best 70 per cent of receiver locations at the outer limits of the service, while in the case of Grade B service, the figures are 90 per cent of the time and 50 per cent of the locations. Thus, this difference between 70% and 50%, in a very real sense, means service to people at particular locations in the area.

^{12/} Prior to this grant to Telrad, the Daytona Beach area received, in the main, the programs of only one of the three major networks (R. 90).

for its affirmative finding that the public interest required Telrad's grant to remain in effect during the protest hearing. Thus, the Commission fully met the statutory requirement of Section 309(c) that its "reasons for denial of stay be set forth in the decision." Appellants' argument, in reality, is that the Commission cannot briefly state its reasons but must, in its decision, take up and give detailed written consideration to any and every argument advanced, as if it were passing upon individual exceptions to an initial decision after hearing. To state this argument is, we believe, to refute it. We submit that the Commission can properly meet its statutory requirement by a brief statement of reasons (as it has done here), and that those reasons can be explained, expanded upon, and defended in the Commission's brief. See Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F.2d 727, cert. denied 352 U.S. 935.^{13/} For that is the very

^{13/} In Van Curler, the Commission, in assigning a new VHF channel over the vigorous objections of two UHF stations in the assignment area, set out in a brief and concise statement its reasons, namely, that such assignment "would bring additional television service to a significant number of people." 98 U.S. App. D.C. at 434, 236 F.2d at 729. Appellants claimed that the Commission's opinion and its failure to rule specifically on several of their arguments contravened Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b), which requires that "all relevant matter presented" be considered and that "a concise general statement of the rule's basis and purpose" be set out. This Court rejected the arguments, finding that "the given reasons are rational and support the conclusion" and that "the basis and purpose of the order are amply and understandably, even though succinctly, stated ..." 98 U.S. App. D.C. at 435, 236 F.2d at 730. That is this case.

purpose of a brief -- otherwise, the submission to the Court of the pertinent portions of the Commission's decision would suffice in place of a brief by the Commission. The fact is that appellant has wholly failed, on the basis of the patently invalid arguments it has advanced, to meet its burden of demonstrating that those reasons are arbitrary or erroneous. ^{14/}

II. THE COMMISSION PROPERLY DETERMINED THAT APPELLANT HAD NOT MADE A PRIMA FACIE CASE THAT THE GRANT TO TELRAD WAS NOT IN THE PUBLIC INTEREST.

On the second aspect of its public interest judgment with respect to the stay, the Commission stated (R. 146):

We have, as required by revised Section 309(c), balanced this need of the Daytona Beach area for new television service against the likelihood that the grant in question will have to be set aside after the hearing here ordered. And, while we cannot now state what our conclusions will be in the light of the hearing record, we do not believe, on the basis of the pleadings, that protestants have made a prima facie case that the grant is not in the public interest."

Appellants argue that this finding was erroneous on two grounds: (1) The Commission employed the wrong standard, the

^{14/} Appellants argue that the Commission's opinion here is deficient under the rule of the KFH case (The Radio Station KFH Co. v. Federal Communications Commission, Case No. 13,272, decided June 27, 1957 petition for rehearing pending. But in KFH this Court remanded because the Commission had not made clear the central basis of its determination. As shown above, that is not this case; here the central or main bases of the Commission's judgment are set out. Indeed, since charges of inadequacy because of failure to give specific consideration to every contention were rejected in KFH (App. Br. in Case No. 13,272, pp.30-225; The Radio Station KFH Co. v. Federal Communications Commission, supra), KFH supports our position rather than that of appellants. In this connection, see also Columbia Empire Telecasters, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 112, 228 F.2d 459, where the adequacy of another concise Commission ruling was sustained against Columbia Empire's vigorous objections (See Appellants' brief in that case, pp. 32-36).

proper standard being whether "the likelihood that protested grant will ultimately have to be set aside is extremely remote" (App. Br. 35); and (2) the Commission's judgment that it had not made a prima facie case was error in view of several considerations advanced by appellants. Neither of these arguments has merit.

- A. The validity of the standard employed by the Commission is not properly before the Court, and the standard is, in any event, the correct one.

Appellants' argument (Pt. III, pp. 32-5) that the Commission employed an improper standard in making its stay judgment is not properly before this Court. Although Telrad in its opposition expressly set out the standard which it believed applicable in view of the legislative history and addressed itself to that standard at length (Par. 26, R. 88; par. 35, R. 92-93),^{15/} appellants completely ignored this question in their reply (R. 137-139). Having never raised before the Commission their present argument that a stay can be refused only where the Commission finds that the likelihood is "extremely remote", they cannot raise it here for the first time. Section 405, 47 U.S.C. 405;^{16/} Albertson v. Federal Communications Com-

^{15/} The standard urged by Telrad (R. 88, 92-3) was the one employed by the Commission in this case (R. 146), and previous cases. See e.g., Letcher Broadcasting Corp., 14 Pike and Fischer, R.R. 183, 188; Donald F. Whitman, 13 Pike & Fischer, R.R. 849, 853.

^{16/} Section 405 of the Communications Act provides, in pertinent part, that "The filing of a petition for rehearing shall not be a condition precedent to judicial review ..., except where the party seeking such review... relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass."

mission, ___ U.S. App. D.C. ___, 243 F.2d 209; Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 72, 78, 202 F.2d 398, 303-4. In fact, the argument is so much an afterthought that it is not set out in appellants' Notice of Appeal, and is thus barred on this ground also. Section 402(c); 47 U.S.C. 402(c); ^{17/} Stuart v. Federal Communications Commission, 70 App. D.C. 265, 267, 105 F.2d 788, 790; Colorado Radio Corp. v. Federal Communication s Commission, 73 App. D.C. 225, 229, 188 F.2d 24, 28 (concurring opinion of Judge Edgerton); cf. Jesionowski v. Boston & Maine R.R., 329 U.S. 452, 458-9.

While we believe the foregoing procedural defects are dispositive of this issue, we will, in order to present a complete picture, also briefly treat the merits of the question. Appellants' argument that the Commission can properly refuse to stay a protested grant only where it specifically finds that the likelihood of having to set aside the grant is extremely remote, is based solely on an isolated statement in the legislative history of the 1956 amendment to Section 309(c). The short answer to the argument is, therefore, that it has no foundation in the controlling statutory language, which simply vests discretion in the Commission to refuse a stay where the

^{17/} Section 402(c) of the Communications Act provides that an appeal under Section 402(b) shall be taken by filing a Notice of Appeal within thirty days and that such notice shall contain "a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered". Appellants' "Statement of Reasons upon which Appellants intend to Rely" contains no point or reason encompassing the question of the propriety of the Commission's standard.

public interest so requires. See United States v. Missouri Pac. Ry. Co. 278 U.S. 269, 278, The Elm City Broadcasting Corp. v. Federal Communications Commission, 98 U.S. App. D.C. 314, 235 F.2d 811. While the likelihood of having to set aside the grant is obviously a factor to be considered in the public interest judgment,^{18/} just as obviously, there is no specific restriction in the statute limiting the Commission's discretion to the single situation where it can find that likelihood extremely remote. On the contrary, what is called for, in clear and unambiguous language, is a judgment on the facts of each case whether the affirmative finding required by Section 309(c) should be made. Appellant is thus unmistakably requesting this Court to rewrite Section 309(c) so as to provide that the Commission may determine not to postpone the effective date of the protested authorization only where it finds that the public interest so requires and that the likelihood of having to set aside the grant after hearing is extremely remote. But, Congress, which certainly knew how to impose such a restriction, had it desired, has not done so.

Even if the legislative history were considered controlling, appellants' case would not be furthered. For, appellants, in effect, base their argument on a single sentence in the Senate Report (S. Rep. No. 1231, 84th Cong., 1st Sess. p. 4), stating that in circumstances where "the likelihood is extremely remote that the protested grant will ultimately

^{18/} See S. Rep. No. 1231, 84th Cong., 1st Sess., p.4.

have to be set aside", the Commission should not be precluded from considering whether the public interest requires the protested authorization remain in effect. But the statement was set out to illustrate the problem, and certainly does not mean that only in such circumstances is the Commission authorized to consider the public interest question presented in any stay of the grant. We think it clear that the language in the Senate Report, read as a whole, merely indicates an intent to impose upon the Commission the obligation, stated in the next following paragraph of the Report, that "in exercising its limited discretion to continue a protested authorization in effect, the Commission would have to consider not only the need for the new service in question but also the likelihood that the grant in question will ultimately have to be set aside". (Ibid.) Exactly such consideration of the likelihood of ^{19/} the protestants prevailing at the hearing was expressly given here.

In short, Congress was content with the Commission's assurance that, in exercising the discretion granted it would "... not only consider whether the protested authorization is required to provide important services to substantial areas or populations which would otherwise have to do without, but also whether the issues designated for hearing present probable grounds for setting aside the Commission's previous determination that the grant in question would serve the public interest" S. Rep. No. 1231, 84th Cong., 1st Sess., 10 (emphasis added) and left the question of where the balance should fall in any individual case to the Commission's discretion under the "public interest" standard.

^{19/} The other indications in the legislative history support our position. See statements of Senator Pastore, the chairman of the Subcommittee which held the hearing on the revision of Section 309(c) and the author of the report on which appellants rely so heavily, at p. 83, Senate Hearings. Further, neither the hearings held by the House Committee (House Hearings), nor the House Committee

- B. The Commission correctly determined that appellants had not made a prima facie case that the grant was not in the public interest.

Acting pursuant to the appropriate standard, the Commission balanced the "... need of the Daytona Beach area for new television service against the likelihood that the grant in question will have to be set aside after the hearing here ordered" (R. 146). It found that appellants had not "made a prima facie case that the grant is not in the public interest" (Ibid.) and therefore concluded, in light of the clear need for the new service proposed by Telrad, that the grant should not be postponed. Appellants claim that the Commission's finding that they had not made a prima facie case is erroneous on several grounds, none of which, we submit, has merit.

First, appellants assert that while Telrad, from its new site, would continue to provide a good viewable television signal for the residents of Daytona Beach, the critical consideration is not the availability of a viewable signal but "the provision for communities of substantial size of local broadcast facilities which will fulfill their needs as a transmission outlet" (App. Br. 20). And, appellant argues, Telrad, as a result of its move, will no longer be a local outlet for Daytona Beach, but "as a practical matter" will become "a 3rd VHF station for Orlando" (Ibid.).

But the difficulty with appellants' argument is that it is wholly unsupported by factual allegations tending to make out a prima facie case. On the contrary, the facts, as gleaned 19/(Cont'd) report (H.Rep. No. 1051, 84th Cong., 1st Sess.), nor the floor debate (101 Cong. Rec. 11, 11,152-11,162) contain the slightest support for appellants' position; indeed, in none of these sources is there any reference to the necessity for Commission consideration on the question of the stay of whether the grant would ultimately have to be set aside.

from the protest pleadings, are that Telrad is presently serving as a local outlet for Daytona Beach and will continue all of its local programming; that Telrad now has a main studio in Daytona Beach and will continue to have that studio, with no studio whatever in Orlando. The pleadings show changes, but the changes are patently in the public interest: Telrad will be able to increase operating hours and obtain additional network service; it will provide service to a greater area (including Orlando), and specifically will for the first time provide "a Grade A signal throughout all of Volusia County within which Daytona Beach is located" (R. 4A); and an auxiliary studio will be erected at the transmitter site, which is very near DeLand, the county seat of Volusia County and the location of John B. Stetson University. The fact that Telrad, because of its wide area coverage, may now become the NBC affiliate for this area (which is apparently the real nub of this whole controversy) does not in any way militate against the public interest, however, much it affects appellants' private interest. If anything, it will make Telrad a more profitable station, and thus one better able to program locally for the Daytona Beach and Volusia County area.

In short, while we fully agree with appellants that the crucial consideration is whether Telrad will serve essentially as a programming outlet for the Daytona Beach area, we fail to see how appellants, in the face of the foregoing facts and considerations, can maintain that they establish a prima facie case to the contrary.

Appellants also urge that it was unreasonable for the Commission to find that the protestants had not made out a prima facie case in view of the fact that the Commission had written a 309(b) letter in August, 1955^{20/} with respect to a proposal by previous owners of Telrad to modify the construction permit to move the station transmitter to a location in the same general vicinity in which Telrad is presently seeking to move its transmitter. In this letter, appellants point out, the Commission stated that, as a result of the move toward Orlando, "a question is thus raised as to whether, in fact, your proposed operation is designed to serve the particular needs of Daytona Beach and its surrounding areas" (App. Br.22). Appellants argue that since the essence of their protest to the similar move now proposed by Telrad is the same question, namely "... whether such an intention [to serve Daytona Beach] is in fact held by Telrad or whether the effect of the move is to deprive Daytona of its own service", the Commission's 1955 action was equally applicable to the instant proposal of Telrad.

^{20/} Under the provisions of Section 309(b) of the Communications Act, the Commission, where it feels it cannot make the finding that a grant of an application is in the public interest, is required to send a letter to the applicant so informing him and affording him an opportunity to demonstrate why his application should be granted, rather than designated for hearing. Upon receipt of the reply, the Commission determines whether the matters raised in its 309(b) letter have been resolved or whether a hearing is still required. The previous owners of Telrad withdrew their application without filing a reply, and the matter thus terminated without any Commission action subsequent to the dispatch of the 309(b) letter.

But the circumstances surrounding the two proposed moves are by no means the same.^{21/} The original request to move the transmitter site of the Daytona Beach station was made at a time when no substantial effort had been made to build the station at its originally authorized site and there was no record of performance by the Daytona Beach station as a station meeting the needs and interests of Daytona Beach or of Volusia County, in which Daytona Beach is located. In fact, the former application failed to include any statement by Telrad as to the possible effect of its change on its programming service or its studio locations (Telrad application BMPCT-2846; R. 71). Under these circumstances, the Commission felt that a question had been raised as to whether in fact the proposed modified operation was really designed to serve the particular needs of Daytona Beach and its surrounding areas. Now, however, Telrad is on the air as an operating station serving Daytona Beach. It has submitted a detailed showing with respect to both its present and proposed programming showing its continuing interest in providing service especially

^{21/} It should be noted that the 309(b) letter, written to the previous owners of Telrad also raised questions as to the financial qualifications of the then owners of Telrad to undertake the modification they had proposed, and as to the accuracy of the site coordinates as specified in the earlier modification application. These are admittedly not involved with respect to the current move.

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directed to the needs of Daytona Beach and Volusia County. It has reaffirmed Daytona Beach as its main studio location and has proposed an auxiliary studio near the Volusia County seat (R. 4A). Thus, the Commission, because of Telrad's past and continuing operations in Daytona Beach and because of specific assurances as to the future, has been given very strong assurance on the crucial question presented. The Commission was accordingly not acting unreasonably in finding, under these very different circumstances, that the bare allegations that the station operating from its modified site would no longer serve the interests of Daytona Beach did not make out a prima facie case.

22/ Appellants claim that no such detailed showing was made, and point to the fact that Telrad did not, in its application for modification of construction permit, fill out Section IV, the section devoted to present and proposed programming (App. Br. 245). But the record discloses that Telrad referred the Commission to the showing made "... in Section IV of application BTC-2175 granted April 25, 1956." (R. 4A), a document already on file with the Commission which did contain detailed representation. (The relevant portions of that document may be found at pp. 229-32 and 278-89 of the Record filed in this Court in Granik and Cook v. Federal Communications Commission, Cases No. 13,730 and 13,731, presently pending.) Telrad explicitly stated that no substantial change from the program service described therein was proposed, and that it simply planned "to increase the operating hours of the station with as much additional service from the networks as may be available" (R. 4A). Further, a detailed survey of Telrad's present programming, including communications from local Daytona Beach and Volusia County residents and organizations expressing their gratitude for services performed, was attached as an exhibit to Telrad's Opposition to Appellants' Protest (R. 96-114).

Appellants cite other Commission cases as indicating that the instant question is a serious one, to be resolved only after full hearing (App. Br. 23-4). But the leading case in this field, Gulf Television Co., 12 Pike & Fischer, R.R. 447, affirmed, Houston Consolidated Television Co. v. Federal Communications Commission, 99 U.S. App. D.C. 378, 240 F.2d 409, cited by appellant at p. 24 of its brief, fully establishes the reasonableness of the Commission action here challenged. For although, as the Court noted, several close questions were presented in that case as to the effect of the transmitter move, the move was properly found to be in the public interest. No such close questions are presented here. For example, in Gulf there was a serious question, because of size and number of programs originated, as to whether the applicant's Houston or its Galveston studio was its main studio. Gulf Television Co., supra, at 470a, 470m. Here Telrad has proposed no studio at all in Orlando. It is difficult to see how Telrad could become a transmission service for Orlando, without any studio facilities in that community. Cf. The Tribune Co., 9 Pike & Fischer, R.R. 719.

Finally, appellants argue that the Commission reached its stay determination without taking into account the likelihood of success on two issues proposed by appellants but originally stricken by the Commission. These two issues relate to whether a site specified by appellants north of Daytona

Beach, rather than the site chosen by Telrad, might not better serve the public interest. The Commission originally rejected these issues (R. 145), but as a consequence of the Court's order of May 7, 1957 with respect to the stay request in the case, it designated the issues for oral argument. Appellants argue that at the time of designation for oral argument, the Commission should have reconsidered its stay determination, because "the Commission's original refusal to accept the two issues was based not upon a tentative determination that the appellants could not succeed with respect to them, but upon a legal interpretation that the issues were without the scope of the Commission's legislative jurisdiction, which view has obviously been abandoned by the Commission" (App. Br. 27-28).

In the circumstances, however, the Commission has clearly not abandoned its judgment as to the lack of merit to these issues. The Commission squarely found "no basis in the Communications Act, our Rules or in prior decisions, for such a comparison of the two sites" (R. 145). In designating the two issues for oral argument as if on demurrer, the Commission did not in any way indicate an abandonment of that view. Clearly, the designation flowed from this Court's order of May 7, 1957, and the requirement of Section 309(c) that oral argument be afforded "before the Commission may eliminate as insufficient any issue which has been raised" (Senate Report, No. 1231, 84th Cong., 1st Sess., p. 4). This is not to say,

of course, that the Commission will not fairly consider the arguments adduced by appellant at the oral argument but only that, as is often the case where the Commission employs the oral argument route, the Commission is not convinced, as of this time, of the merits of protestant's position and is "looking toward a decision on demurrer..." (Id. at p. 5). Thus, insofar as appellants' argument is grounded upon the assumption that the Commission has never considered the likelihood of its success on the two noted issues in connection with its judgment on the stay,^{23/} it is clearly without merit.

^{23/} As to the actual merits of these two issues, which are of course not properly before the Court in this appeal (Myers v. Bethlehem Corp., 303 U.S. 41, 50), we think it is clear that the issues and the supporting allegations did not make any prima facie case as to the invalidity of the Commission's grant. For there is absolutely no support in the Commission's rules, or in the Sixth Report and Order which established the present television allocations, for the allegation that a station, operating on the Daytona Beach assignment, was intended to provide service to the area north of Daytona Beach in preference to the area to the south that city.

CONCLUSION

For the foregoing reasons, the decision of the Federal Communications Commission should be affirmed.

Respectfully submitted,

Warren E. Baker,
General Counsel,

Richard A. Solomon,
Assistant General Counsel,

Henry Geller,
Counsel,

Joel Rosenbloom,
Counsel,
Federal Communications Commission

September 5, 1957

BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,835

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 3 1957

MID-FLORIDA RADIO CORP.,
MID-FLORIDA TELEVISION CORPORATION,

Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee

TELRAD, INC.,

Intervenor.

ON APPEAL FROM DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. DEMPSEY
WILLIAM C. KOPLOVITZ
FREDERICK H. WALTON, JR.

938 Bowen Building
Washington 5, D. C.

Attorneys for Intervenor

12 11 1944

12 11 1944

12 11 1944

(i)

QUESTIONS PRESENTED

See stipulated statement of Questions Presented,
Appellant's Brief (i).

(ii)
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TELRAD, INC.,
Intervenor

ON APPEAL FROM DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

COUNTER STATEMENT OF THE CASE

Corrections deemed necessary in appellant's Statement of the Case (BR. 2-11) are noted below. Intervenor, of course, takes exception to those few expressions by Appellant which color and characterize the facts stated so as to put appellant's contentions in a favorable light and to reflect unfavorably upon those of appellee and intervenor. It may be also noted here that intervenor has submitted in support of its argument (infra, pp. 9-12 incl.) supplementary information concerning its application to the Commission which is a part of the record on this appeal.

In addition to the corrections noted in appellee's Counter Statement of the Case, the respects in which intervenor believes it to be necessary to supplement or correct appellant's statement of the case are as follows: (references are to its Brief)

- (1) Br. 6 -- Appellant is in error in stating that the separate rule-making referred to is still pending. Rule-making was terminated by order released June 3, 1957, effective July 5, 1957. 15 Pike & Fisher RR 1663. Appellant's statement is incorrect in stating that the site to the north of Daytona Beach was "almost identical with that proposed by the owners of Telrad in a separate rule-making proceeding". The proposal for allocation of Channel 10 to Bunnell was made in December, 1954 with notice of rule-making issued in April, 1955, one year before principal ownership of Telrad, Inc. passed to its present owners. Also the owners of Telrad did not propose a transmitter site location as actually available for use by a new station in the rule-making proceeding. For rule-making purposes, in accordance with standard Commission procedure in such cases, a hypothetical site in the center of the city of Bunnell, Florida was assumed but not represented as available to Intervenor as Appellant's loose statement might imply.

- (2) Br. 8 -- the conclusion of the first paragraph should be supplemented with the following additional statement of Intervenor's position as summarized in para. 7 of the Commission's Memorandum Opinion (R. 144-5):

"...that the entire remaining area within the proposed WESH-TV Grade A contour for the first time would be afforded a choice of service. Furthermore, Telrad alleges that all of Volusia County, within which Daytona Beach is located, would be provided with a Grade A service; that within a greater part of WESH-TV's new service area, only Stations WDBO-TV, Orlando and WMBR-TV, Jacksonville,

now provide service and that these stations are predominantly CBS outlets; that WESH-TV will provide, for the first time, a choice of NBC and/or ABC programs and that the need for effective competition among stations as network outlets is obvious. Additionally, WESH-TV points out that due to its present limited coverage it has been unable to provide regular network service to Daytona Beach and that the only other service to Daytona Beach is received from WDBO-TV, Orlando, which places only a Grade B signal in the city. Therefore, WESH-TV asserts that the Commission must find that the public interest requires that the grant remain in effect."

Br. 8 should also be supplemented as follows:

Telrad's Opposition specifically referred to the showing (R. 70-78) that had been made to establish the lack of merit in all of the protest allegations and that the grant should remain in effect since there was therefore little likelihood of success for the protest after hearing. R. 92-93.

(3) Br. 8, second paragraph--the statement is incorrect that appellant's Reply "responded to the arguments of Telrad on the merits." Reference to the reply itself shows that it specifically avoided response to intervenor's Opposition on the merits. Said Reply stated "Telrad deals principally with the merits of the questions presented by the protest which are not before the Commission at this time...." [Emphasis supplied] R. 129. Appellant's Reply then listed and addressed itself to only three questions which it said were before the Commission. R. 129.

(4) Br. 10--last sentence--the full context of the quotation from the Broadcast Bureau's pleading should be included.

"Inasmuch as the protestants urged upon the Court that the error in failing to afford them at least oral argument on the two noted issues affected the public interest determination on the question of postponing the effective date of the grant, we believe that the Commission (irrespective of which of the two suggested procedures it may decide to adopt) should expressly decide whether the inclusion of these issues either in the evidentiary hearing or in an oral argument in any way affects its previous action refusing to stay construction. We do not believe it should." R. 151. [Emphasis supplied]

SUMMARY OF ARGUMENT

I

Congress has committed to the Commission discretion to determine upon affirmative finding whether public interest requires that a protested grant authorizing a new service proposed by an applicant should remain in effect pending hearing on the protest. In exercising its discretion in this case the Commission considered as one of two proper factors, whether appellant had shown such likelihood of success in establishing grounds for setting aside the grant as to require postponement of the effectiveness of the grant pending hearing. The Commission affirmatively found that on the basis of the pleadings before it when it acted, appellants had failed to make a prima facie case of likelihood of success in proving that grounds existed for setting aside the grant as being contrary to the public interest. As appellant concedes, the Commission's finding is proper if the factual support adduced for the allegations of the protest were insufficient to establish the likelihood that the allegations could be proved at a hearing. Reference to appellant's protest shows that little or no factual support existed or was advanced for the allegations of the protest. Such allegations were largely based on the speculations and conjectures of protestant made on "information and belief". Though appellant made no contention before the Commission concerning

its likelihood of success as a factor to be considered by the Commission, it argues now that this Commission determination is erroneous as a matter of law because (1) the Commission allegedly ignored a prior "determination" that a similar application could not be found to be in the public interest and (2) the Commission allegedly ignored two issues which, if considered, would have precluded the Commission's finding that appellants had failed to show likelihood of success.¹ There is no merit in either point.

As to the first, the applications though similar in requested technical transmitting facilities were clearly distinguishable both in time, other application content (including statement of purpose) and assurances as to intention, and the context of policies existing at the time of Commission consideration. Moreover, the Commission in relation to the earlier application requested no more than a clarification of that applicant's purpose and did not, as appellant suggests, reach a positive determination that the proposed facilities would be contrary to the public interest without regard to that applicant's purpose or intention when disclosed.

As to the second point concerning the "two issues" appellant has changed its legal position so as to advance matters for the consideration of this Court on which the Commission has been given no opportunity to pass. The record moreover does not support appellant's contention that no consideration has been given by the Commission to the two issues in question. On the contrary the issues have twice been before the Commission and been passed on, and on each occasion the Commission has taken action conclusively establishing that it does not consider that the two issues in question present "grounds for setting aside the grant" as provided by Section 309(c). Appellant has failed to show that this determination was erroneous as a matter of law and that if proved the grant as a matter of law must be set aside as contrary to the public interest.

¹ See 2(a) and 2(b) of Statement of Questions Presented, Appellant's Br. (i).

II.

In its consideration of need for the proposed new service as the other factor in determining whether public interest required the protested grant to remain in effect, the Commission enumerated in its decision, as required by Section 309(c) the reasons or grounds for its finding of need. Four such grounds were separately enumerated in the Commission's decision. In attacking the sufficiency of only one of these four reasons, appellant has failed utterly to address itself to and therefore must be deemed to concede the sufficiency, in fact and law, of the three remaining grounds. Hence the Commission's finding of need cannot be shown as a matter of law to be unsupportable by any proper grounds or reasons. Moreover, as to the one reason stated by the Commission and called in question by appellant, i. e., that the proposed new service would provide a first Grade B service, appellant submitted no matter of fact which could possibly support the conclusion by this Court requested by appellant, i. e., that the Commission was wrong, as a matter of law, in the light of the evidence before it, in finding that a first Grade B service would be provided to 25,000 persons. Indeed in its Reply to Opposition before the Commission, appellant argued only that the 1956 figures it submitted on percentage of homes in Marion and Levy Counties with receivers precluded a finding by the Commission that all or any of the 25,000 persons in question were without any television service. The Commission made no finding inconsistent with appellant's contention below, since the Commission's finding was that 25,000 persons were without Grade B service, a fact based on competent and sworn engineering computation made in accordance with the Commission's Rules, submitted by intervenor and not controverted by any engineering statement on rebuttal. The data on receivers submitted by appellant to the Commission certainly did not and could not itself prove the existence of Grade B service. At best appellant's data and contentions come to no more than that the Commission should not have given much if any weight to

the undisputed fact (so far as competent engineering authority is concerned) that a first Grade B service would be provided to 25,000 persons in view of the fact asserted by appellant that a minority of homes in the area affected already had sets for receiving signals of less than Grade B standard defined by the Commission's Rules. The Commission therefore committed no error and did not abuse its discretion by finding that a first Grade B service would be rendered to 25,000 persons and by including that finding among three other reasons, the accuracy and sufficiency of which, as independent grounds to support a finding of need, was nowhere challenged by appellant.

III.

Appellant may not question on this appeal the legal sufficiency of the Commission's stated concept of the statutory standards to be applied under Section 309(c) when such a question was not included among the stipulated statement of questions presented and when no question was raised by appellant below concerning the legal sufficiency or propriety of the statutory standards applied by the Commission to the facts presented below under Section 309(c) of the Communications Act.

ARGUMENT

I.

The Appellee Commission Properly Found That Appellant Had Not Made A Prima Facie Case That Intervenor's Grant Was Not In The Public Interest²

A. Background Statement - The Application and the Commission's Action

Under the mandate of Section 309(c)³

"....pending hearing and decision [on the protest] the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless.... the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect...."

Appellant, in a protest filed under Sec. 309(c) requested that the effective date of intervenor's grant be postponed until a decision was made after hearing on the protest. The Commission denied that request and its action in so doing is the only question raised on appeal or properly before this Court for review at this time.

In its Memorandum Opinion and Order of April 10, 1957 (R. 142-148) denying appellant's request for postponement of the effectiveness of intervenor's grant, the Commission, after quoting the passage from Section 309(c) quoted above, stated:

"In amending Section 309(c), the Congress indicated that the Commission in exercising its discretion should consider two factors--the need for the new service and the likelihood that the grant in question would ultimately have to be set aside" [Citing Pike & Fisher 1 RR 10:373, Senate Report accompanying H. R. 5614 amending Section 309(c)] R. 146.

In exercising its discretion the Commission stated first that it was "of the view that there is need for the [intervenor's] proposed new service." The reasons for this determination or affirmative finding were clearly set forth (R. 146, para. 10) in the Commission's decision as required by law. These reasons and appellant's limited attack upon them

² Argument hereunder is responsive to item 2 of the stipulated "Statement of Questions Presented".

³ Act of January 20, 1956 /70 Stat. 37 U.S.C. Title 18, Section 309(c).

as to their sufficiency as proper grounds for the discretion exercised by the Commission within the limits it recognized as applicable, are considered hereinafter in this brief. (See Heading II infra)

As to the second factor which the Commission recognized should be weighed in exercising its discretion under Section 309(c), the Commission concluded:

"....we do not believe, on the basis of the pleadings, that protestants have made a prima facie case that the grant is not in the public interest." R. 146.⁴

The Commission then concluded, in the light of its noted determinations of need for the proposed new service and of protestant's failure to show likelihood that the grant would ultimately have to be set aside, that,

"....we affirmatively find the public interest requires that the grant remain in effect; and accordingly, the effective date of the Commission's action here in question will not be postponed."

Appellant seeks review in this Court of that determination and seeks to have this Court reverse that determination on the ground that the Commission abused the discretion committed to it by law under Section 309(c). It will be shown hereinafter that appellant's arguments are unsound and without merit. However, before doing so, it is believed necessary, owing to appellant's persistent refusal to acknowledge the stated purpose of intervenor's application and indeed owing to misleading inaccuracies in appellant's brief, that intervenor summarize briefly the facts in order that the Court may have a proper understanding of the application which was filed by intervenor and which the Commission granted.

The present ownership of Telrad, Inc. was acquired on April 28, 1956. At that time there was no station in operation in Daytona Beach.

⁴ The full text of this paragraph of the Commission's decision is here quoted for convenience of reference.

"11. We have, as required by revised Section 309(c), balanced this need of the Daytona Beach area for new television service against the likelihood that the grant in question will have to be set aside after the hearing here ordered. And, while we cannot now state what our conclusions will be in the light of the hearing record, we do not believe, on the basis of the pleadings, that protestants have made a prima facie case that the grant is not in the public interest." (FCC. Memorandum Opinion & Order, April 16, 1957) R. 146.

Aside from Station WDBO-TV, Orlando, which was then operating and had been operating continuously since June 5, 1954, the nearest operating TV station to Daytona Beach were in Jacksonville, Florida, approximately 90 miles away. Telrad, Inc. then held a construction permit originally granted in July of 1954 for a new TV station, construction of which was only partially completed on April 28, 1956. The authorized operating facilities of this station were an effective radiated power of 1.26 kw visual with an authorized antenna height of 320 ft. using Channel 2 with transmitter and studios in Daytona Beach.⁵ One month after acquisition, construction of Station WESH-TV as authorized, was completed by intervenor and by diligent effort local service was brought for the first time to the people of Daytona Beach with the commencement of operation of Station WESH-TV, Daytona Beach. The coverage of this station (as authorized upon the application of the former owners for original CP) was severely limited, however.

The Grade A contour extended only about 10 miles from Daytona Beach (R. 122, depicting "present WESH-TV" Grade A contour). The more extended Grade B contour (R. 124) even failed to cover as much as 10.7% of Volusia County, WESH-TV's home county (R. 119, line 5).

Following a period of operation and experience with these facilities, intervenor filed on August 13, 1956, the application (R. 3B-29) later protested by appellant. Intervenor stated the purpose of said application clearly, as follows:

"Applicant has completed construction of Station WESH-TV and commencing May 29, 1956, has been operating in accordance with its outstanding construction permit. In order to provide an improved service to Daytona Beach and its home county--Volusia County--as well as the many other persons in East Central Florida who now must depend upon only a very limited amount of service from operating television stations, applicant proposes herein to construct and operate improved facilities for Station WESH-TV." R. 8

⁵ Appellant's Br. 3.

The application specifically proposed the following:

- (a) increase effective radiated power to the maximum of 100 kw visual. (R. 16, para. 1 & 2)
- (b) increase its antenna height of 995 ft. overall above ground. R. 16, para. 7a.
- (c) move and locate the antenna and transmitter at a location 5 1/2 miles south of DeLand, the county seat of Volusia County (R. 16, para. 4; R. 19, para. 1; R. 4A), which antenna location "was selected after many conferences with aeronautical interests and is the only acceptable location that a 1000 ft. antenna system can be erected and provide the required city grade service to Daytona Beach". R. 22, para. 2.
- (d) maintain the station location (principal community) at Daytona Beach, R. 4, paras. 1 and 2(a); R. 4A; R. 16, para. 3.⁶
- (e) make no change in studio location. R. 4A; R. 16, paras. 1J and 5.⁶
- (f) supplied information concerning its program service with the facilities applied for as required by para. 2(b) of the application form (R. 4, see para. 2b) referring to Section IV (Program Service) with exhibits in application BTC-2175 as previously filed February 20, 1956, which material was incorporated by said reference (R. 4, Instruction E)

⁶ It is clear from these references that intervenor's application in no way involved a move or change of any kind in the WESH-TV station location (or principal community) R. 16, para. 3), nor any move or change in the WESH-TV main studio which would remain where it was in Daytona Beach. Nonetheless, appellant in more than one instance has employed very misleading and prejudicial references to Telrad's proposal as one "to move Station WESH-TV" from Daytona Beach (Br. 19) and again "to move its station from Daytona Beach" (Br. 20). The station and studio location were to remain in Daytona Beach. Only the antenna-transmitter location was moved to a location near the county seat so as to improve service to Daytona Beach, to the home county of Volusia and generally to East Central Florida.

without substantial change except as specifically set forth (R. 4A), which read:

"No substantial change is proposed in the program service described for Station WESH-TV in Section IV of application BTC-2175 granted April 25, 1956. It will be applicant's plan by the improved technical facilities proposed herein to bring the aforesaid proposed schedule of local and film originations to large areas of central Florida now without such service, and to increase the operating hours of the station with as much additional service from networks as may be available. The increase in facilities with a more centrally located transmitter near DeLand, as requested herein, will in applicant's opinion serve as a most important improvement in the program service rendered locally by Station WESH-TV by providing local and network service with a Grade A signal throughout all of Volusia County within which Daytona Beach is located. DeLand is the county seat of Volusia County and the location of John B. Stetson University, the largest university in East Central Florida. For the convenience of the county seat area or other persons appearing on local originations who are closer to the proposed transmitter than to the main studio in Daytona Beach, an auxiliary studio will be maintained at the transmitter,"
R. 4A.^{6a}

This is the application to which appellant and other Orlando interests raised objections under Section 309(b) and which were repeated in the later protest. R. 30-36. This is the application which the Commission granted without hearing after having determined that the applicant was fully qualified, having found that the grant of the application would serve the public interest and after having "carefully considered the matters alleged by you [appellant] as objections to the application,"⁷ found that in the Commission's opinion they did not

^{6a} See footnote 6, supra.

⁷ That the Commission carefully considered intervenor's application was not mere rhetoric. Six months elapsed after intervenor filed its application before the Commission acted upon it.

"constitute an adequate basis for designating the application of Telrad, Inc. for hearing".⁸ This was the application protested and this was the application against which the Commission "upon consideration of the [protest] pleadings"⁹ did not believe "that protestants have made a prima facie case that the grant is not in the public interest."

Appellant seeks to have this Court find that the Commission abused its discretion in determining that a prima facie case was not made out by appellant's protest such as would require the grant to be set aside. In addressing itself to this error, appellant concedes that the Commission's conclusion thereon could reasonably and properly be interpreted to mean that

- (a) "even if the facts alleged by appellant are true, no serious question with respect to the public interest is thereby raised" or
- (b) "the factual support adduced for the allegations of the protest were insufficient to establish the likelihood that the allegations could be proved at a hearing." Appellant's Br. 21.

Of these two reasons, it is submitted that the second is obviously the applicable one and that the first is one suggested by appellant to confuse the issue and to create a "straw man", to the destruction of which appellant devotes so much of its brief. Thus, in relation to alternative (a) as quoted it may be conceded arguendo that if the facts alleged by appellant were true, "some serious question with respect to the public interest would be raised." That the commission recognized this, is evident in the fact that the Commission ordered an evidentiary

⁸ These quotations are from the letters addressed by the Commission to each of the objecting parties. Appellant's Br. 4-5. See also para. 5 Opposition of Intervenor, Telrad, Inc. to Petition for Stay Order and Interlocutory Injunction, as filed in this appeal April 30, 1957.

⁹ Including intervenor's Opposition and appellant's Reply.

hearing.¹⁰ Had it believed that "even if the facts alleged were to be proven, no grounds for setting aside the grant are presented" (see Section 309(c)), then it would have been required in following the mandate of Section 309(c) to have set the entire protest down for oral argument and not for evidentiary hearing.

Obviously, therefore, the Commission's determination that appellant had not made a *prima facie* case against the grant of the protested application must be taken to have meant and referred only to the second of the reasons on which the Commission could have properly relied for reaching that determination. Extensive arguments are made by appellant throughout its Brief to try to show that if allegations of fact were proved or assumed to be true, serious questions would be raised. For the reasons just developed, these become arguments which are extraneous and irrelevant to the matters in issue on this appeal.

With regard to the Commission's determination that appellant had failed as a Protestant to make a prima facie case against intervenor's application on which the protest could have been considered to have any real or serious likelihood of success, it is unnecessary under the stipulated Statement of Questions Presented for intervenor to show to this Court as it showed to the Commission by detailed factual exposition of matters of record at that time that there was no merit in protestant's bare allegations of fact. As intervenor demonstrated (R. 70-78; R. 92-3, para. 35) to the Commission, these allegations though verified were unsupportable and uncorroborated by reference to

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As it was required to do where there were "unresolved factual issues". Clarksburg Publishing Co. v. F.C.C., 96 U.S. App. D.C. 211, 225 F. 2d 511, 514-5 (CA D.C. Cir. 1955). As to the Commission's determination of the protest allegations for hearing as distinguished from the affirmative finding on maintaining or postponing the effectiveness of the grant, the Federal case precludes the Commission from relying upon the opposition to a protest for resolution of any fact alleged through unproved by the protestant on a protest issue. Federal Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 293, 231 F. 2d 246, 250 (CA D.C. Cir. 1956).

the application or other matters then of record.¹¹ For example, appellant in its Br. 23, states that the

"...essential question presented in the protest hearing now being conducted by the Commission is whether such an intention ['to serve the particular needs of Daytona Beach and its surrounding areas'] is in fact held by Telrad..."

Reference to appellant's protest shows that its allegations on this "essential question" all relate to speculative matters only in-directly related to suggesting as a mere possibility that Telrad did not actually mean its announced and clearly stated intention to continue as a Daytona Beach station because appellant, on the contrary, stated its own unsubstantiated belief that intervenor intended to become an Orlando station and to abandon Daytona Beach. Paragraphs 11 and 12 of appellant's Protest contain its principal allegations concerning intervenor's intention. R. 51. It will be seen from these references that even these "allegations" are based merely on information and belief. They are allegations based only on protestant's expectations.

The question before this Court is narrower, however, since the stipulated Statement of Questions Presented raise for the Court's consideration only two points of error with regard to the Commission's determination that the protestants had not made a prima facie case that the Telrad grant is not in the public interest. These are

- (a) the effect of the Commission's letter to Telrad in August 1955, approximately one year and a half before it granted intervenor's application; and

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Appellant suggests (Br. 22-23) that the fact that the Commission found no lack of specificity in the allegations of the protest, is an acknowledgment or recognition that appellant's protest allegations were amply supported by verified "specific factual information" sufficient to suggest the likelihood that the allegations could be proved at a hearing. Such a suggestion is not only contrary to the facts of record below but it leads to the absurd conclusion that wherever an evidentiary hearing (as distinguished from oral argument) is ordered on unresolved factual issues (see preceding footnote 10, supra) the likelihood of success of the protest is automatically determined.

- (b) the effect of the Commission's action on two issues which were not set down for evidentiary hearing.

Before submitting to this Court the lack of merit in either of these points of error, intervenor wishes to call to the Court's attention the fact that nowhere, either in its Protest¹² nor in its Reply to Opposition¹³ (the only pleadings filed by appellant with the Commission before this appeal was taken) did appellant address any argument or make any contention concerning the "likelihood of success of its protest" as a factor to be weighed by the Commission in reaching its affirmative finding under Section 309(c) that the effectiveness of the grant of intervenor's application should not be postponed. This silence by appellant is truly significant in view of the fact that intervenor in its Opposition (R. 70-128) had specifically alleged that likelihood of success had not been shown by protestant and referred to the detailed showing intervenor had made to show the utter lack of merit in appellant's allegations (R. 70-78; R. 92-3). It is submitted that appellant has failed to satisfy the rudimentary requirements of exhaustion of administrative remedies with respect to this contention on which its appeal is now principally based. No petition for rehearing was filed by appellant with the Commission. O'Neill Broadcasting Co. v. United States, ____ U.S. App. D.C. ____, 241 F.2d 443 (CA D.C. Cir. 1956), also Albertson v. Federal Communications Commission, ____ U.S. App. D.C. ____, 243 F.2d 209, 211 (CA, D.C. Cir. 1957).

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In its Protest, the only reference made to postponement of the effectiveness of grant of Intervenor's application was in a perfunctory concluding pro forma request (R. 56, prayer 3) which did not discuss the factors to be considered by the Commission on this subject.

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In its Reply to Opposition, the only matters submitted in support of its request for postponement of the effectiveness of the grant were contained in two pages (R. 137-9) in which no mention whatever is made of the position appellant now takes before this Court to insist that likelihood of success of its Protest was such as to require postponement of the effectiveness of the grant.

B. Stipulated Question 2(a) - The 1955 309(b) letter.

With respect to the first of the two specifications of error asserted against the Commission's determination that likelihood of success of the protest had not been shown, the Commission's letter of August 1955 to Telrad cannot, when properly interpreted in its own context of facts, be used in any way to establish that the Commission erred in April, 1957 when it determined that appellant's protest had failed to show any likelihood of success.

The context of facts in which the Commission wrote its August, 1955 letter to Telrad under its prior ownership, were these. In July, 1954, the Commission granted to Telrad, Inc. (then under different ownership) a construction permit for low power and tower facilities at Daytona Beach on Channel 2. In January, 1955, without having constructed or put in operation the facilities authorized by the original permit, Telrad applied for a modification of permit to specify facilities substantially similar in tower height, power and transmitter location as those which were requested nearly 30 months later in August, 1956 by intervenor under present ownership. Objections to this January, 1955 application of the former owners were filed by letters from appellant, and by one of the former appellants in the instant proceeding.¹⁴ It is out of these similarities that appellant has built its argument. It will be seen that these similarities are not persuasive in the light of the many dissimilarities that exist. In August, 1955, the Commission wrote a letter to the applicant pursuant to Section 309(b) of the Act informing Telrad of the reasons why a grant without hearing of its application could not be made on the basis of facts before the Commission at time of writing and affording the applicant an opportunity to reply so as to inform the Commission

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Objection was also filed by the Board of Public Instruction of Dade County, Florida, for reasons which were not raised against intervenor's application and not relevant therefore to this proceeding.

of any reason why the applicant believed that the application should be granted and should not be designated for hearing.

Three reasons were specified by the Commission in its August 1955 letter. One was technical in nature and concerned accuracy of the geographical coordinates specified for the antenna-transmitter location. A second reason was basic since it involved failure of the applicant to make the requisite showing of financial qualification required by law. A third reason was the one relied upon here by appellant. With respect to it the Commission said in its 1955 letter:

"In view of these facts, it appears that your proposed operation may result primarily in additional service to Orlando rather than in service to the areas surrounding Daytona Beach. A question is thus raised as to whether, in fact, your proposed operation is designed to serve the particular needs of Daytona Beach and its surrounding areas." ¹⁵

The first matter to be noted from this quoted portion of the Commission's letter is that the Commission was not, as to this specific reason or portion of its letter, making any finding, such as appellant suggests, that from the facts recited in the letter, the proposal was one inherently and perforce contrary to the public interest. Quite the contrary, the Commission was referring to what merely "appeared" from the facts and concluded only that a "question" was raised concerning the "design" or intention of the proposal insofar as it concerned service to the "particular needs of Daytona Beach and its surrounding areas." Contrasted with this language is the positive language concerning Telrad's lack of financial qualification "it cannot be determined that you have sufficient assets to construct and operate your station as

proposed in your application." The former suggests that the Commission was not satisfied that it had all of the facts concerning the design, purpose or intention of the proposal. The latter indicates an affirmative finding of non-qualification. Now, were there any grounds for the Commission to be uncertain with respect to the design of the 1955 Telrad proposal that were not present in February, 1957 when it acted to grant intervenor's application? Many highly relevant differences existed. Each of these differences was pointed out to the Commission¹⁶ and were before it in the pleadings "on the basis" of which it specifically stated it had made its determination that appellant's protest had failed to make a prima facie case that the grant would have to be set aside.

What were these relevant differences?

(1) The January 1955 application made no statement of intention or purpose with regard to the service intended to be rendered by the substantial change in facilities proposed for a station not constructed. In contrast, as already noted above, clearcut statements were set forth by intervenor in the application it filed as to its purpose and intention and the objectives to be attained by the facilities it proposed and particularly included therein was intervenor's specific statement that continuation of existing service to the needs of Daytona Beach and Volusia County was intended¹⁷ (R. 71-72).

(2) The original owner applied to make the changes in question without ever having built the original station or without having operated to serve the needs of Daytona Beach. This was certainly a consideration which when coupled with the lack of any specific statement of design or objective as set forth in the preceding paragraph would

¹⁶ Intervenor's Opposition to Protest, para. 1-5 (R. 70-74).

¹⁷ In its Brief (24-25), appellant addresses itself to this point and denies that intervenor's instant application in fact makes any showing concerning the purpose of the application or its impact on WESH-TV's programming. The Court may judge for itself whether the record references (R. 4A and R. 8) are lacking in such statements, as appellant contends or whether statements and a showing thereon were made as intervenor and the Commission contend.

reasonably cast a doubt or raise a question as to what the applicant's "design" was "primarily" and whether it was "primarily" to abandon Daytona Beach in favor of Orlando. In considering intervenor's application, however, no such problem nor uncertainty was reasonably existent because intervenor had directly stated its purpose to seek the improvement in facilities "primarily" for Daytona Beach and Volusia County and moreover had with speed and diligence completed construction and commenced operation of WESH-TV at Daytona Beach and had a record of 8 months operation (In Feb. 1957) of serving the local needs of Daytona Beach and the surrounding area.¹⁸ Thus the reasonable and concrete assurances that were absent in the case of the original application were specifically present and clear in intervenor's application which by an operating record substantiated the requested improvement of facilities as being one of and for Daytona Beach. (R. 72)

(3) Undecided policy questions existed in August, 1955, on various matters pertaining to the effects and relationships of transmitter locations outside the station location (principal community). These policy decisions and developments in expertise had been made and became settled in February, 1957 when action was taken on intervenor's application. (R. 72-73) Thus, in August, 1955, the Commission had pending for adoption as a general rule a new policy proposal requiring location of TV transmitters (subject to unusual circumstances) within five miles of the city of allocation.¹⁹ By Report and Order released November 15, 1955, the Commission refused to adopt the proposed limitation and said:

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See intervenor's Opposition (R. 72, para. 4) and affidavit of T.S. Gilchrist, Jr. referred to therein (R. 98-115).

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In its letter of March 5, 1955, objecting to the former Telrad application, Mid-Florida called specific attention to the conflict of the applicant's proposal with the proposed new rule. R. 72-73.

"The Commission's present rules afford wide flexibility in the choice of transmitter sites. The proposed amendment, however, would place a fixed mileage limitation on the location of such sites. We have carefully reviewed and evaluated the comments filed in this proceeding and have concluded that a fixed limitation on the location of sites is neither desirable nor practicable. In our view a provision which would require transmitters to be located within a specified distance from the city to be served could defeat the objectives of our Assignment Table by preventing the most efficient employment of television channels. It is essential, we believe, that the licensee retain flexibility in choosing a site since many varied factors enter into the selection of a site--factors such as terrain, local zoning regulations, air hazard considerations, economics, etc." [Emphasis supplied.] 13 Pike & Fisher RR 1535-6.

Intervenor also pointed out (R. 73) to the Commission in its Opposition to the Protest that not only had the 5-mile limit proposal been rejected by the time intervenor's application was acted upon but the Commission had, by case to case applications of the rules, developed new expertise and policy interpretations determining that substantial changes of transmitter location are not in and of themselves incompatible with the Commission's Rules or the public interest but on the contrary are proper and consistent therewith, even though an improvement in service or extension of coverage to a community larger than the station community would be involved. Most authoritative among these because it was reviewed by this Court and affirmed by per curiam opinion was the Houston Consolidated Television case, ____ U.S. App. D. C. ____, 240 F.2d 409, (CA D. C. Cir. 1956) sub nom Gulf Television Co., 12 Pike & Fisher RR 447. This Court found no error in the Commission's determination that the public interest is served by proposals which seek to bring about a more efficient and greater utilization of channels so that an ever growing number of the public may enjoy availability of a wider choice of service, notwithstanding substantial improvement in

service or coverage given to a city larger than the one in which the station is located.²⁰

As previously stated, each of these distinguishing differences was pointed out to the Commission by intervenor in its Opposition to protest (R. 70-74) and was thus before the Commission when it found "on the basis of the pleadings" that protestants failed to make a prima facie case that the grant was not in the public interest.

Appellant (Br. 24-25), of course, refuses to admit that the differences noted are distinguishing. not address itself at all to the third of the differences noted above, i. e., the intervening changes in expertise and policy decisions.²¹ Indeed, it did not file anything below with the Commission responding to any of the three differences noted by intervenor.

Before this Court, however, appellant asserts (Br. 24) that it sees no significance in the fact that the Commission could derive concrete assurance of WESH-TV's continued service to Daytona Beach from its 8-month operating record as a Daytona Beach station. This is done by a singularly inconsistent argument. Appellant says that in the case of the 1955 Telrad application the Commission must "presume" because of the absence of any statement thereon, that the original program proposals of Telrad for the low tower, low power station would be fulfilled. Ergo, the failure of Telrad's former owners to build WESH-TV before they applied to change transmitter site was, in appellant's view, a consideration of no signifacance, not even in the

²⁰ These same questions were decided in Petersburg Television Corp., 12 Pike & Fischer, RR 1395 and Richmond Newspapers, Inc., 10 Pike & Fischer, RR 567, 584(o).

²¹ References by appellant in its Brief (p. 23) to two recent cases may indirectly touch this point. One of these, the prehearing letter on the move of a Manchester transmitter site, was fully answered (footnote 4, R. 74) previously as a matter involving Hall case implications and other questions not present here. The Examiner's decision in the Deep South case which appellant also cites is wholly inapposite--denial of the application in that case is proposed because of hazard to air navigation, excessive competitive injury, lack of adequate financing and other matters not involved at all in the instant case.

light of the fact that the 1955 site change application was completely silent as to any statement of purpose or design.

Appellant's inconsistency is evident, for in the very next paragraph (Br. 24-5),²² it is unwilling to "presume" anything and is unwilling even to acknowledge what was specifically stated in intervenor's application. Intervenor submits that this Court may determine whether intervenor's application included or was lacking in references and statements on purpose and objective, anticipated programs service changes, continuation of basic local programming, existing main studio and station location (principal community). See supra, pp. 10-12. Whether appellant in its opinion regards these as adequate or not is immaterial. Appellant still fails to explain how the absence of any such statements or commitments in the 1955 application is not a significant difference when compared to intervenor's application.

Thus, the Commission's letter of August 31, 1955, to the former owners of Telrad and the attending facts and circumstances are sufficiently different from the facts before the Commission in February, 1957 so that the Commission could properly find based on the "pleadings" that appellant's protest had failed to make a prima facie case that the grant was not in the public interest notwithstanding the 309(b) letter addressed to a predecessor applicant some year and one half earlier. It is submitted that appellant has failed to show in law or reason that the Commission was bound by its August, 1955 letter in a way that required as a matter of law a finding that the grant would prove not to be in the public interest in February 1957.

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On page 25, line 11, it is believed that a typographical error was made in that "unable" should read "able".

C. Stipulated Question 2(b) - The Two Issues.

Another reason, as preserved by the stipulated Statement of Questions Presented, why appellant believes that the Commission erred as a matter of law in making its finding that on the "pleadings"²³ before it, the protest had failed to make a prima facie case that the grant was not in the public interest, was the Commission's alleged failure to consider two of the protest issues in making its findings.

Appellant is plainly wrong. The Commission obviously considered the two issues both in its April 10th opinion and order as well as in its later order of May 23, 1957, when it ordered oral argument thereon. In fact, more attention and consideration by the Commission as well as by the interested parties has been given to these two issues as issues than to all the rest of the issues specified in the protest. Only in a highly technical legal sense can there be any color to appellant's contention of no consideration and even then it is not true.

The Commission rejected the two issues in its original order because it clearly deemed them (and said so) to be lacking in sufficient "basis" or merit as proper issues on which the Commission could determine that the application for improvement of WESH-TV's application could be denied. It is significant to note that in its Reply (R. 135-7) to intervenor's Opposition to the Protest below, appellant argued to the Commission that the two issues it had requested were proper issues under the authority of only two cases. Hall v. F. C. C., 99 U.S. App. D. C. 86, 237 F.2d 567 (CA, D. C. Cir. 1956) and Beaumont Broadcasting Corp. v. F. C. C., 91 U.S. App. D. C. 111, 202 F.2d 306 (CA D. C. Cir. 1952).²⁴

²³

The Protest, applicant's Opposition and protestant's Reply.

²⁴

See p. 11 of appellant's Petition for Stay Order and Interlocutory Injunction in this case.

In support of its argument now on these two issues, appellant does not refer to either of these cases and has abandoned them in favor of two other cases (Br. 27) which it never cited to the Commission in the Reply pleading it filed before the Commission adopted the only order now before the Court on appeal. As intervenor pointed out to this Court in its Opposition (pp. 10-11) to appellant's Petition for Stay Order and Interlocutory Injunction, the Beaumont case was clearly not applicable to the facts in this case.²⁵

Apart from the fact that appellant has completely changed its position on these two issues and is urging upon this Court matters of law not presented to the Commission when it was considering the order here on appeal, its contention is without merit in other respects.

As already noted, there is no truth to the allegation that the Commission refused to consider or did not in fact consider the two issues in question. The Commission considered them but regarded them as having so little bearing or merit as proper grounds for denying intervenor's application that it refused to specify them as issues for evidentiary hearing. This Court indicated by its May 7, 1957 stay order that appellant was entitled under Section 309(c) to an opportunity for oral argument before the Commission could reject the issues. As the Court knows, Section 309(c) was amended to allow the Commission to exclude from evidentiary hearing any issues in a protest "which the Commission after affording protestant an oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented." See Sec. 309(c).

In its Petition for Stay and Preliminary Injunction to this Court, appellant argued:

"This Court, however, must now certainly consider the clear violation of the rights of Protestants on the failure of the Commission to provide oral argument before these rejected issues were eliminated." (p. 13)

By its order of May 7, this Court indicated its agreement with appellant's position that even where the Commission considers that the tendered issues could not under the Communications Act, its Rules, or its past decisions serve as a basis for denying intervenor's application, it must nonetheless afford oral argument to the protestant before it rejects such issues. The Commission by its order of May 23 released May 27th, complied with the Court's order and designated the two issues for oral argument. This Court accordingly, by its order entered June 27, 1957, dissolved the stay and denied appellant's petition for stay.

Appellant, however, asserts (Br. 28) that the Commission has never considered these two issues as bearing upon appellant's likelihood of success in proving that the grant of the application was not in the public interest and that intervenor's application must be denied. The argument is fallacious. Intervenor submits that there is no more conclusive action that the Commission can take to show that it considers matters alleged in a protest as presenting "no ground for setting aside the grant" (see Section 309(c)) than for the Commission to follow the procedure of the Act of withholding demurrable issues from the evidentiary hearing and affording protestant an opportunity for oral argument thereon.

Clearly then, the Commission's original action in rejecting the two issues and its later action of May 23 released May 27, affording oral argument²⁶ to appellant established clearly (a) that it considered

²⁶ No appeal from this order was taken by appellant. Any attack by appellant on the correctness of the Commission's action in ordering oral argument on the two issues, rather than setting them down for evidentiary hearing, must await appeal, if any, from the Commission's decision disposing of the protest. Indeed it may be questioned whether it is open for a appellant to allege that the Commission erred in its order of May 23 released May 27 in ordering oral argument rather than evidentiary hearing since oral argument was what appellant told this Court was its right. See appellant's Petition for Stay (p. 13).

the two issues not once but twice and (b) that in each instance by its action and order determined clearly that it did not regard the matters asserted by appellant in these two issues as presenting "grounds for setting aside the grant". Section 309(c). In the light of these considerations, it is vain for appellant to argue as it does that if the Commission had considered these two issues (which the Commission has by interlocutory order determined do not present grounds for setting aside the grant) the Commission could by any law, logic or reason, possibly conclude that the protest thereby showed reasonable likelihood of success in establishing the grant to be contrary to the public interest.

Thus the Commission did not err in its finding that on the "pleadings" appellant had not made a prima facie case that the grant is not in the public interest because it decided that the two issues in question did not present adequate grounds for setting aside the granted application.²⁷

II

The Commission's Determination that Intervenor's Proposed Operation Would Fill A Significant Public Need Was Legally and Factually Sufficient And Within Its Discretion.

In making its determination on the need for the new service proposed by intervenor, the Commission said:

"10. We are of the view that there is need for the proposed new service. Operating as proposed, WESH-TV will bring a first Grade B service to approximately 25,000 persons and a second Grade B service to an estimated 212,000 persons. In addition, approximately 47,000 persons will receive a first Grade A service as a result of the proposed operation. Furthermore, since WESH-TV proposes NBC and/or ABC network programs

²⁷ Appellant (Br. 27) purports to find error in the fact that the "Commission did not in any way address itself to this question /quoted in appellant's Br. 27/ in the order designating the issues for oral argument." The Court may be interested to know that for that matter appellant likewise did not address itself to the point since it made no reference of any kind to it in the only pleading appellant addressed to the Commission before the Commission entered its order on the further disposition of the two issues. (R. 161-3)

viewers would, for the first time, have a choice of live network programs. In view of this, it appears that the proposed operation would fulfill a significant need by providing a first or second service to a large number of people."

The Commission thus listed four separate or independent reasons or grounds for its finding on this matter committed to its discretion by Congress. Appellant's allegations of error on this finding of need are based entirely upon the claim that the finding cannot be sustained as a matter of law because the Commission did not advert to certain matters alleged by the protestant directed against the weight to be given to only one of these four reasons.

Appellant's contention must of necessity fail because, even if it were conceded arguendo that the Commission should not have accorded any significance to the unrebutted engineering fact that the proposal would provide a first Grade B service to approximately 25,000 persons, appellant has nowhere shown either before the Commission or this Court that the three other reasons on which the Commission rested its determination of need for service were in any way legally improper²⁸ or inadequate to support the determination of need and the affirmative finding of public interest in continuing the effectiveness of the grants. For appellant to succeed in having this Court reverse the Commission's affirmative finding of need for the proposed new service, appellant must show that none of the reasons specified by the Commission pursuant to Section 309(c) are proper. Securities Exchange Commission v. Chenery Corp., 332 U.S. 194, 207 (1947). Otherwise this Court would be put in the impossible position of finding an abuse of discretion by the Commission because one of four specified reasons was in appellant's view less substantial even though the Court had no basis whatever for questioning the propriety of the three remaining grounds. The appeal on this specification of error thus fails.

²⁸ Appellant's pleadings (R. 137-9) before the Commission on this subject made no mention, much less submitted any information or data rebutting or questioning the showing made by intervenor in its Opposition that these three additional reasons required a finding that a need for the new service existed. R. 88-92, R. 96-110.

Not only are the three grounds specified by the Commission's decision correct and unassailable²⁹ but appellant has likewise failed to show any error in the Commission's finding that "WESH-TV will bring a first Grade B service to approximately 25,000 persons". Appellant's so-called evidence that a minority of the homes in certain counties have television receivers does not and cannot prove that a Grade B service is rendered in those counties nor does Appellant claim that it does. Its claim is at best that, when it submitted data indicating that a minority of the public had receivers, the Commission could not then make the finding that 25,000 persons would receive a new Grade B service until after it had by some undisclosed means or procedure itself determined whether the service available in those counties was in fact Grade B or better.³⁰ Appellant is completely wrong in suggesting that the burden was on the Commission itself to find or determine the nature and character of the service available in Marion and Levy Counties which was alleged to exist by appellant. The determination of Grade A and Grade B field intensity contours and the prediction of coverage are prescribed by Sections 3.683 and 3.684 respectively of the Commission's Rules. 1 Pike & Fisher RR (Pt. 1) 53:674-7. The burden was on appellant to show that these methods could not be applied to this situation and what method was appropriate for determining location of Grade A and B contours. As this Court stated, if the area in question "were asserted to be an abnormal area, it would be altogether fair to require that proof of the abnormality be

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It is submitted that any attempt by appellant to undertake by Reply Brief to repair this fatal deficiency would be wholly irregular and prejudicial to the rights of intervenor before this Court in view of its previous silence on the three reasons previously unobjected to. In footnote 12 of its Brief 29, appellant refers to added contentions of Telrad for reasons to support a finding of need for service. Appellant does not, however, address itself to the three other grounds specified in the Commission's order.

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Of course, as already noted, even if the Commission could not make that finding as appellant alleges, the Commission's finding that a need existed for the proposed new service would have been supported by the other three reasons which are unchallenged by appellant.

adduced by the parties relying thereon. Absent such proof, the propagation curves are applicable." [Emphasis supplied] Hall v. FCC, 99 U.S. App. D.C. 86, 93, 237 F.2d 567, 574. It did not make any proof and indeed did not even file (R. 137-141) any engineering statement to rebut in any way the engineering (R. 115-128) prepared pursuant to the rules and submitted by intervenor on the basis of which the Commission found that a first Grade B service would be rendered to 25,000 persons (R. 128).³¹

Moreover, in its pleading before the Commission, appellant's position was that the sets in use in Marion and Levy Counties precluded a finding that these areas were without any television service. R. 138-9. The Commission did not disagree with this contention which appellant made to it below. The Commission found as its opinion and order plainly shows, only that a first Grade B service would be provided. Nothing appellant filed below could possibly establish that this finding was inaccurate. The fact that the Commission did not find that less than Grade B service was available in Marion and Levy Counties of some undefined or undetermined substandard character which in March 1956 only a minority of homes were equipped to receive, is not such evidence which if accepted could possibly affect the accuracy of any of the four reasons specified by the Commission in its opinion and order, nor the sufficiency of any of those four reasons to support the affirmative finding made by the Commission in its expertise that a need for the proposed new service existed. In non-comparative proceedings the exclusion from the Commission's opinion of reference to facts or matters immaterial or irrelevant to the reasons or grounds for its decision is not an abuse of discretion or an illegal act, if the reasons and grounds for its decision are sufficient and adequate to support its finding of need.

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In footnote 13, appellant submits to this Court without any citation of authority, or citation to the record herein, statements of engineering fact which it did not call to the Commission's attention in the disposition of this point and which have never been raised before.

III

Appellant's Argument That the Commission
Applied the Wrong Statutory Standards Is Not
Within the Scope of This Appeal.

In its Brief (32-36) Appellant argues that the Commission misapplied the statutory standards of Section 309(c) in refusing to stay the Telrad grant. This point is beyond the scope of the stipulated statement of questions presented (see Appellant's Brief (i)) which are concerned entirely and exclusively with allegations of error arising from alleged failure by the Commission to consider certain facts and allegations asserted by appellant in its protest. No question was framed attacking the Commission's interpretation nor legal conception of the statutory standards of Section 309(c). Even if appellant's argument that the Commission applied a mistaken legal concept as to the statutory standard of Section 309(c) is deemed to be within the scope of the stipulated statement of questions presented, review of the point by this Court may not now be invoked by appellant since it failed and refused to present the point to the Commission by rehearing or otherwise. Since appellant gave the Commission no opportunity to consider appellant's present arguments concerning the statutory standards of Section 309(c), this Court will not review the point. O'Neill Broadcasting Co. v. United States, _____ U.S. App. D. C. _____, 241 F.2d 443 (CA D.C. Cir. 1956); Albertson v. F.C.C., _____ U.S. App. D. C. _____, 243 F.2d 209 (CA D.C. Cir. 1957).

WHEREFORE, it is respectfully prayed that this Court affirm the decision of the appellee Commission below which found that the public interest would be served by allowing the grant of intervenor's application to remain in effect pending a hearing on appellant's protest.

Respectfully submitted,

WILLIAM J. DEMPSEY
WILLIAM C. KOPLOVITZ
FREDERICK H. WALTON, JR.
938 Bowen Building
Washington 5, D. C.

Attorneys for Intervenor

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

JUL 19 1957

No. 13,835

Joseph W. Stewart

CLERK

MID-FLORIDA RADIO CORP.,
MID-FLORIDA TELEVISION CORPORATION,
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

TELRAD, INC.,

Intervenor.

ON APPEAL FROM DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

LEONARD H. MARKS
PAUL DOBIN
STANLEY S. NEUSTADT

317 Cafritz Building,
Washington 6, D. C.

Attorneys for Appellants

STATEMENT OF QUESTIONS PRESENTED

All parties agree that this Appeal presents the following questions:

1. Whether the Commission's affirmative finding that the public interest requires that the Telrad grant remain in effect was made without consideration of the facts brought to the attention of the Commission by protestants bearing upon this matter, and if so, whether this is reversible error.
2. Whether the Commission, in refusing to stay the Telrad grant, could properly find that protestants had not made a prima facie case that the Telrad grant is not in the public interest
 - (a) where the Commission, in connection with an earlier proposal to move Station WESH-TV filed by Telrad, Inc. when it was under different ownership, had advised Telrad that the Commission was unable to determine that a grant of said earlier proposal would be in the public interest, and this earlier action of the Commission was disregarded in the Commission's decision; and
 - (b) if the Commission's decision failed to consider the probability of protestants' success as a result of the possible inclusion of two issues in the proceedings which had originally been excluded without affording protestants an opportunity for oral argument.

¹ The questions presented, as here set forth, were agreed to among the parties in a Stipulation approved by order of this Court issued June 3, 1957.

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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 13,835

MID-FLORIDA RADIO CORP.,
MID-FLORIDA TELEVISION CORPORATION,
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee
TELRAD, INC.,
Intervenor

ON APPEAL FROM DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal by Mid-Florida Radio Corp. and Mid-Florida Television Corp.¹, (hereinafter sometimes referred to as Mid-Florida Radio and Mid-Florida Television), Appellants, pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b) from a Memorandum Opinion and Order of the Federal Communications Commission released April 10, 1957 (R. 142-8) which granted in part and denied in part a Protest filed by Appellants pursuant to

¹ At the time the Notice of Appeal in this action was filed Orlando Broadcasting Co., Inc., Central Florida Broadcasting Co., and WORZ, Inc. were also appellants. These appeals were dismissed by orders of this Court issued June 7 and July 5, 1957.

Section 309(c) of the Communications Act of 1934, as amended, 47 U.S.C. 309(c), against the grant by the Commission, without hearing, of an application for modification of the television construction permit of Telrad, Inc. (hereinafter sometimes referred to as Telrad) for Television Station WESH-TV, Daytona Beach, Florida, and which refused to stay the effectiveness of the Commission's action pending a hearing ordered on portions of the protest. This appeal is directed only to that portion of the aforementioned Memorandum Opinion and Order which refused to stay the effectiveness of the Commission's grant of modification of the construction permit of Station WESH-TV pending the protest hearing. The Notice of Appeal was filed in this Court on April 23, 1957.

STATEMENT OF THE CASE

On March 8, 1957, Appellants filed a Protest pursuant to Section 309(c) of the Communications Act against the Commission's prior action granting, without hearing, an application by Telrad, Inc., the holder of a construction permit for Television Station WESH-TV, located at Daytona Beach, Florida, for modification of that permit to change the transmitter site of the station, to increase its power and to increase its antenna height (R. 44-69). On April 10, 1957, the Commission released a Memorandum Opinion and Order (R. 142-8) in which it held that Mid-Florida Television Corp. lacked standing to protest that action, but that Mid-Florida Radio Corp. did possess the requisite standing and had alleged sufficient facts to warrant the designation of the Telrad application for hearing on certain specified issues but not with respect to others. The Commission refused to include in the hearing two other issues raised by the protest and it refused to stay its grant of modification of the Telrad permit pending the protest hearing.

This appeal is directed to that portion of the aforementioned Memorandum Opinion and Order which refused to stay the effectiveness of the Commission's grant. The questions of the standing of Mid-Florida Television Corp. and the rejection of the two specified issues are not deemed ripe for review at this time, in view of the fact that the hearing on the Protest has not yet been terminated. It is felt, however, that Mid-Florida Television Corp. does have standing to seek review in this Court of the Commission's failure to stay the grant to Telrad.² In addition, the treatment of the two rejected issues, although not here on the merits directly affects the matters presently on appeal.

The factual background of the Commission's decision is as follows:

Telrad, then under different ownership, had been issued a construction permit by the Commission for Television Broadcast Station WESH-TV to operate on Channel 2 with transmitter and studios in Daytona Beach, Florida, with effective radiated power of 1.26 kw visual and .759 kw aural. The authorized height of its antenna was 320 feet.

On January 26, 1955, Telrad, still under different ownership,³ applied to the Commission for modification of its construction permit to change its transmitter site, power and antenna height (R. 48).⁴ Upon a preliminary review of this application, the Commission informed

² On June 6, 1957, the Commission granted the application of Mid-Florida Television for a construction permit for a new television station. This order is now under review in case No. 13,996.

³ The Commission has since that time approved the sale of the stock of Telrad to its present owners in an action which is the subject of the proceedings before this Court in Granik and Cook v. Federal Communications Commission, Case Nos. 13,730 and 13,731.

⁴ That application proposed to move the transmitter site from a location one-half mile north of Daytona Beach to a location approximately 22 miles from Daytona Beach and 25 miles from Orlando, to increase antenna height above average terrain from 320 feet to 950 feet, and to increase visual effective radiated power from 1.25 kw to 100 kw. As will be shown, the proposed change is virtually identical to that involved in the present case.

Telrad that it was unable to find on the basis of the information before it that a grant of the application would be in the public interest, and that accordingly the application must be designated for hearing, (Ibid.)⁵ Among the reasons given by the Commission for its failure to find that the public interest would be served by the modification requested was the question raised thereby whether the proposed operation would result primarily in additional service to Orlando rather than to the areas surrounding Daytona Beach, and whether the proposed operation was in fact designed to serve the particular needs of Daytona Beach and its surrounding areas. No hearing was ever held on this application, the application having been withdrawn (R. 49).

On August 17, 1956, Telrad, under its present ownership, filed the application which is the subject of the present proceeding. That application requested modification of the construction permit for Station WESH-TV so as to (1) move its transmitter site to a point near Orange City, Florida, 25.62 miles from its present location, and only 27.53 miles from Orlando, Florida; (2) increase its visual effective radiated power from 1.26 kw to 100 kw; and (3) increase its antenna height from 320 feet to 940 feet (R. 3B-29). Subsequent to the filing of this application, but prior to Commission action thereon, each of the original appellants in this proceeding called to the attention of the Commission its prior preliminary determination that the contemplated change in the facilities of Station WESH-TV was not in the public interest (R. 30-31; 32-34; 35-36).

Despite the Commission's earlier determination and the objections of the original appellants, the Commission on February 6, 1957, granted the Telrad application without any hearing (R. 39). On the same day, it addressed a letter to each of the objecting parties in which it rejected

⁵ This communication does not appear in the record filed with this Court, but it constitutes a public action of the Commission, and a copy thereof was appended as Appendix B to the Opposition filed by the Commission to Appellant's Petition for Stay Order in this case. The pertinent portion thereof is quoted in the protest (R. 48) and Page 22, infra.

their contentions, although this letter did not set forth any reason for the Commission's apparent change of view with respect to the public interest considerations involved in the proposed move of Station WESH-TV towards Orlando.

On March 7, 1957, Mid-Florida Radio, Mid-Florida Television, Orlando Broadcasting Co., Central Florida Broadcasting Co. and WORZ, Inc., filed a Joint Protest and Petition for Reconsideration of the Commission's grant of Telrad's application for modification of construction permit, pursuant to Sections 309(c) and 405 of the Communications Act (R. 44-69). This Protest alleged, inter alia, that the proposed shift in transmitter site of Telrad's station would result in Station WESH-TV becoming a television station for the Orlando market rather than for Daytona Beach, and thus violate Section 307(b) of the Communications Act and the Commission's own Table of Television Assignments (Section 3.606 of the Commission's Rules and Regulations, 47 C. F. R. 3.606). It was pointed out that the Table of Assignments assigned Television Channel 2, on which WESH-TV is authorized to operate, to Daytona Beach, Florida, and not to Orlando, which is allocated channels of its own. The Protest further alleged that it was the intention of Telrad to hold itself out to potential advertisers as an Orlando station, and to identify the station for purposes of national and local advertising as an Orlando station. It was further alleged that Telrad intended to secure for its station a regular television affiliation with the National Broadcasting Company, and to serve as NBC's regular affiliate in the Orlando market. It was alleged that Telrad had withheld from the Commission full disclosure of its intention to operate Station WESH-TV as an Orlando station.

The protestants alleged that the operation of Telrad's station from its proposed site would constitute a disregard for the interests of the viewing public located north of Daytona Beach, and submitted in

support of this allegation, engineering evidence concerning the service which could be rendered by a television station located to the north of Daytona Beach on a site almost identical with that proposed by the owners of Telrad in a separate rulemaking proceeding (which is still pending before the Commission) requesting the allocation of an additional channel to the area north of Daytona Beach.

The Protest requested that the Telrad application for modification of construction permit be designated for evidentiary hearing on the following issues:

(a) To determine whether, in view of the circumstances of this case, the purpose of the proposed move of the transmitter location and the change in operating facilities of Station WESH-TV is to provide an additional television broadcast service to Orlando and its surrounding area in derogation of the Commission's allocation policies and rules, particularly Sections 3.606 and 3.607 thereof.

(b) To determine the programming plans of the applicant, especially in relation to the representations made to the Commission, and to determine whether there has been a full and frank disclosure thereof.

(c) To determine whether the grant of the instant application is consistent with and will further the objectives of the provisions of Section 307(b) of the Communications Act of 1934, as amended.

(d) To determine whether the applicant's proposed use of the channel assignment is consistent with and will further the objectives of Section 307(b) of the Communications Act of 1934, as amended.

(e) To determine whether the grant of the instant application is consistent with and will further the objectives of the provisions of Sections 3.606 and 3.607 of the Commission's Rules.

(f) To determine whether the applicant's proposed use of the channel assignment is consistent with and will further the objectives of the provisions of Sections 3.606 and 3.607 of the Commissions Rules.

(g) To determine whether the needs of these areas and populations in the Daytona Beach area currently without a Grade A service should be subverted to the needs of those that currently receive a Grade A signal from Station WDBO-TV and would receive a second Grade A signal if operation of Station WESH-TV should commence as Telrad has proposed.

(h) To determine whether the needs of the populations and areas to be served by the instant Telrad proposal are superior to the needs of those populations and areas which would receive service should operation of Television Broadcast Station WESH-TV commence as proposed by the protestants herein.

(i) To determine whether a full, complete, and candid disclosure has been made with regard to all of the facts and circumstances surrounding the filing and prosecution of the instant application with particular reference to a network affiliation by the applicant and all representations made to the Commission concerning network affiliation, as well as the substance of all negotiations, agreements, and understandings with the networks regarding the utilization of the facilities proposed.

(j) To determine what effect the rendition of a Grade A television service to the City of Orlando and a principal city signal to a major portion thereof will have upon the program policies and programs to be broadcast by Station WESH-TV, if operated as proposed.

(k) To determine the effect which the proposed extended coverage will have upon the availability and usefulness of the applicant's facilities to the Daytona Beach public and its environs.

(l) To determine, in view of the foregoing, whether the grant of the instant application is consistent with the public interest, convenience and necessity.

On March 18, 1957, Telrad filed an Opposition to the Joint Protest and Petition for Reconsideration in which it urged that the Protest should be summarily dismissed; in the alternative it contended that if a hearing or oral argument was held, the Commission should not stay the effectiveness of its grant of authority to move the station pending such a hearing (R. 70-128). It based its contentions that the grant should not be stayed upon an engineering statement showing that, under the Commission's standards, operation by Telrad from its proposed new site would allegedly provide the first Grade B television service (as defined by the Commission) to an area which includes a population of 25,719 persons, and that it would allegedly bring a second Grade B television service to some 212,000 persons who allegedly reside within the Grade B contour of only one operating television station. It was further urged by Telrad that a first Grade A television service allegedly would be brought to some 45,000 people.

The protestants, on March 25, 1957, filed a Reply to the Telrad Opposition (R. 129-141). In this Reply the protestants responded to the arguments of Telrad on the merits. More important, they also joined specific issue with Telrad on its contention that its proposed operation would bring a first television service to a substantial number of persons, and that therefore the Commission's grant should not be stayed. The protestants pointed out, in this connection, that the Commission's standards with respect to Grade B television contours were theoretical and do not define television service as may actually be received by the persons residing in any particular area. The Reply recited recognized statistics demonstrating that there are a very substantial number of television receiving sets in the counties included within the area alleged by Telrad presently to be receiving no television service. Thus, it was pointed out that Ocala, Florida, alleged by Telrad to be in an area which presently receives no television service,

is located in a county in which 37% of the households have television receiving sets. Similar statistics apply to the other county within the so-called "white area." Protestants argued, therefore, that the Commission could not properly find that the grant would provide a first television service to a significant number of persons, or that the "public interest requires that the grant remain in effect," - the finding required by Section 309 (c) of the Communications Act in order that a protested grant remain in effect during the pendency of the hearing on the Protest.

On April 10, 1957, the Commission issued the Memorandum Opinion and Order of which review is sought herein (R. 142-148). In it, the Commission granted the Protest and designated the Telrad application for evidentiary hearing on all of the issues requested by the protestants with the exception of Issues (g) and (h), which issues were rejected summarily. The Commission refused to stay the effectiveness of the grant to Telrad, holding that there is a need for the new service because (1) Telrad would bring a first Grade B television service to approximately 25,000 persons, a second Grade B television service to an estimated 212,000 persons, and a first Grade A television service to approximately 47,000 persons, and (2) the proposed service would result in providing viewers for the first time with a choice of live network programs. The Commission, holding that it was required to do so by Section 309 (c) of the Communications Act, balanced this need for a new service against the likelihood that protestants would ultimately be successful in demonstrating the grant not to have been in the public interest. It concluded that protestants had not made a prima facie case that the grant is not in the public interest. The Commission's decision did not consider or even advert to the facts adduced by the protestants' demonstrating that television service is presently available to all or nearly all of the 25,000 persons

who allegedly receive no television service at the present time.

Subsequent to the institution of the present action, the Commission designated for oral argument before it the two issues ((g) and (h) supra) which it had summarily rejected in the decision hereunder reviewed (R. 164-165). The circumstances leading to this action were as follows:

At the time the Notice of Appeal herein was filed, appellants filed a motion in this Court seeking a stay order and interlocutory injunction. Oppositions to this motion were filed by the Commission and the Intervenor, and a Reply thereto was filed by Appellants. After oral argument on the Motion, this Court, on May 7, 1957, issued an Order staying the Commission's grant to Telrad pending hearing and disposition of this Appeal, provided, however, that upon notice to this Court by the Commission that the Commission had afforded Appellants an opportunity for oral argument on the two aforementioned issues, the Court would reconsider its disposition of the Motion for a Stay.

On May 9, 1957, Telrad filed a Petition with the Commission requesting that the Commission designate the two aforementioned issues for oral argument, (R. 154-160). On the same day the Commission's Broadcast Bureau filed with the Commission a Motion to Enlarge Issues, in which it requested that the two aforementioned issues be designated for oral argument or for evidentiary hearing (R. 149-153). In this pleading the Bureau also urged the Commission that it " * * should expressly decide whether the inclusion of these issues either in an evidentiary hearing or in oral argument in any way affects its previous action refusing to stay construction".⁶

⁶ The pleadings of Telrad and the Broadcast Bureau, as well as the Order of the Commission issued in response thereto, were not part of the original record filed in this Court, since they were submitted and decided subsequent to the initiation of the present case. A Motion to add these documents to the record has been filed.

On May 27, 1957, the Commission issued an Order designating the two aforementioned issues for oral argument before it on the "legal and policy questions" raised by them (R.164-65). On June 27, 1957, this Court lifted the stay.

The evidentiary hearing on the Protest has already commenced, and the oral argument on the two aforementioned issues has been held. No decision with respect to either of these matters has been rendered by the Commission at the present time.

STATUTES INVOLVED

The relevant portions of the Communications Act of 1934, as amended, 47 U.S.C. 151, et seq., are as follows:

Section 309(c): When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such

application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance of conduct or an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

* * * * *

Section 405: After a decision, order, or requirement has been made by the Commission in any proceeding, and partly thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful, for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than

newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed in any case, but any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

STATEMENT OF POINTS

1. The Commission improperly found that the Telrad grant would bring a full television service to some 25,000 persons and that therefore the Telrad grant should remain in effect since the finding was made without consideration of those facts timely brought to the Commission's attention by the appellants, which demonstrated that these persons were not without television service.
2. The Commission improperly held that appellants had not made a prima facie case that the Telrad grant was not in the public interest, and therefore the grant should not be stayed, where it had previously determined that an earlier similar application was not in the public interest and this earlier Commission action was completely disregarded in the Commission's decision.
3. The Commission improperly held that appellants had not made a prima facie case that the Telrad grant was not in the public interest, and therefore the grant should not be stayed, where it failed to evaluate the probability of appellants success on two issues of the protest which had originally

been erroneously rejected, without oral argument, as outside the scope of the Communications Act.

4. The Commission applied the wrong statutory standards in refusing to stay the Telrad grant.

SUMMARY OF ARGUMENT

I.

The Commission refused to follow the regular procedure required by the Communications Act to stay the Telrad grant during the pendency of the protest proceeding. In taking this action, it held that Appellants had not made a prima facie case that the grant of Telrad was not in the public interest. This determination was patently erroneous.

As was made clear from the allegations of the protestants, Daytona Beach and Orlando, Florida are completely independent and separate communities which have been assigned television channels of their own. Each has its own unique needs for local television transmission facilities. The protest alleged that by reason of the proposed move of the Telrad transmitter site from Daytona Beach to a point midway between Daytona and Orlando and by reason of the program and operating changes which would be occasioned by such a move, Daytona Beach, as a practical matter, would be deprived of its only local television outlet. It was further alleged that the net effect of such a move would be to duplicate the service which would be available from Orlando television stations and deprive Daytona Beach and the area to the north of that city of the television service which it was contemplated would be provided to that area by a bona fide Daytona Television station.

The Commission acknowledged the seriousness of these allegations by designating 10 of the 12 issues requested by Appellants for hearing. Examination of these issues demonstrates that the protest

raised very important public interest questions. Moreover, the Commission itself had previously determined that an almost identical move by the prior owners of the station would not serve the public interest. The Commission did not give any consideration to its prior determination; nor did it in any way indicate wherein the instant move was different from the prior proposed move; in fact, there were no significant differences. Under these circumstances, the Commission could not hold that Appellants had not made a prima facie case on their protest.

II.

On refusing to stay the Telrad grant, the Commission also relied on the determination that the grant to Telrad would bring a first service to a large number of people. This conclusion was erroneous and cannot be permitted to stand because the Commission refused to consider facts brought to its attention which demonstrated the conclusion to be factually erroneous. Particularly, Appellants brought to the attention of the Commission the existence of large numbers of television sets in the areas where it was claimed no television service existed. The existence of these receivers in the area claimed by Telrad to be without service placed a burden on Telrad and the Commission (if it wished to leave the Telrad grant in effect) to establish that the Commission's theoretical propagation curves were accurate as applied to this area and that there was in fact no service in the area despite the existence of large numbers of television sets.

In any event and more important, the Commission never considered the evidence submitted by Appellants. Under these circumstances, its decision cannot be permitted to stand; it certainly is beyond the statutory scheme for the Commission to rely upon the allegations brought to its attention by one of the parties while rejecting without consideration the factual data submitted by Appellants.

III.

The Commission's decision was contrary to the statutory scheme because it has misapplied the proper standards contemplated by Congress in connection with protest cases. Under the Act, the burden with respect to a stay of a protested grant, designated for hearing, is not placed on protestants. A stay is required except when it is necessary to maintain an existing service or when it is extremely unlikely that the grant will have to be set aside. The Commission has not found that the likelihood of Appellant's successes is extremely remote and, indeed, it could not, on the basis of the record before it. The proceedings should be remanded to the Commission so that it will be given an opportunity to correct its determination in light of the proper statutory standards.

ARGUMENT

This appeal involves only that portion of the Commission's Order of April 16, 1957, dealing with its refusal to stay the grant to Telrad pending the termination of the hearing which it ordered on Appellant's Protest. Since that hearing is presently in progress, substantive questions relating to the disposition of the Protest as well as the correctness of the Commission's decision that Mid-Florida Television Corporation lacked standing to protest,⁷ are not yet ripe for review.

⁷ It is respectfully submitted that Mid-Florida Television has standing to seek review of the Commission's action refusing to stay the grant to Telrad. Mid-Florida Television was party to the Protest, and, as such, was aggrieved by the Commission's failure to grant the full relief requested therein. Mid-Florida Television was, at the time the protest was filed, one of two applicants for a construction permit for a new television station to operate on Channel 9 in Orlando, Florida. The other applicant was WORZ, Inc. Since the institution of the present Appeal, the Commission has issued a final Order awarding Channel 9 to Mid-Florida Television. As the permittee of a television station in Orlando, Mid-Florida Television obviously suffers the same injury as that suffered by Mid-Florida Radio, the licensee of a standard broadcasting station in Orlando which was held by the Commission to have the required standing to protest the grant to Telrad.

The parties have agreed that the propriety of the Commission's refusal to stay the effectiveness of the grant to Telrad should be considered in light of the Commission's action, after the appeal was filed in this Court, in designating for oral argument two issues raised by Appellants in the Protest but which the Commission had originally summarily rejected.⁸

The correctness of the action taken by the Commission with respect to those two issues is not before the Court at this time. However, the Commission's Order designating the two issues for oral argument does affect the questions raised in this case in so far as they relate to the Commission's evaluation of the likelihood of the Appellant's ultimate success in the protest hearing, a consideration upon which the Commission relied in refusing to follow the regular statutory procedure requiring that the Telrad grant be stayed.

In its Memorandum Opinion and Order of April 16, 1957, the Commission stated explicitly its reasons for refusing to stay the grant to Telrad pending the protest hearing. The Commission's statement with respect to this question is here set forth in full, because it contains the entire factual basis for the Commission's determination, as well as its interpretation of the applicable legal principles.⁹ (R. 146):

We are of the view that there is need for the proposed new service. Operating as proposed, WESH-TV will bring a first Grade B service to approximately 125,000 persons and a second Grade B service to an estimated 212,000 persons. In addition, approximately 47,000 persons will receive a first Grade A service as a result of the proposed

⁸ It should be noted that Issue No. 2B, agreed upon by all of the parties, is based upon the factual situation which resulted after the Commission's designating the two issues for oral argument.

⁹ In the Opposition filed by the Commission to Applicant's Petition for Stay Order and Interlocutory Injunction the Commission set forth a full exposition of its views on the merits of the present action in an effort to demonstrate that Applicants have failed to show a reasonable likelihood that they would prevail in the present appeal before this Court. That pleading addressed itself to virtually all of the contentions made by Appellants, and in the course thereof several arguments were advanced which depart from or add to the reasoning relied upon by the Commission itself in the Order under review. It is respectfully submitted that this case must be decided on the basis of the reasons given by the Commission in its Order and that the arguments in the Opposition to the Petition for Stay Order, varying from that reasoning, must be rejected.

operation. Furthermore, since WESH-TV proposes NBC and/or ABC network programs viewers would, for the first time have a choice of live network programs. In view of this, it appears that the proposed operation would fulfill a significant need by providing a first or second service to a large number of people.

We have, as required by revised Section 309 (c), balanced this need of the Daytona Beach area for new television service against the likelihood that the grant in question will have to be set aside after the hearing here ordered. And, while we cannot now state what our conclusions will be in the light of the hearing record, we do not believe, on the basis of the pleadings, that protestants have made a prima facie case that the grant is not in the public interest.

In light of the foregoing, we affirmatively find the public interest requires that the grant remain in effect; and accordingly, the effective date of the Commission's action here in question will not be postponed.

The Commission's decision was erroneous in several respects. In reaching its conclusion with respect to the necessity for the service to be provided by Telrad from its new site, the Commission failed to give any consideration to evidence submitted by Appellants which demonstrated that the institution of the new Telrad service was not necessary in order to bring a first service to a substantial number of persons. Moreover, the Commission erred in concluding that the protestants had not made a prima facie case that the grant to Telrad was not in the public interest, principally because the Commission had only a short time before determined that a proposal virtually identical to this one raised sufficient questions to preclude the grant of the application. And finally it is clear that whether or not the Commission's determinations with respect to the necessity for service and the likelihood of Appellant's success in the Protest Hearing were correct, the case must be remanded to the Commission because it applied an improper standard in assaying the significance of these

conclusions in the ultimate determination whether the grant should be stayed. The Commission interpreted Section 309 (c) of the Communications Act as requiring that a protested grant be stayed (if it found a need for the new service) only where it was demonstrated to be probable that the protest would be successful. However, it is clear that both express provisions of Section 309 (c) and its legislative history require that a protested grant be stayed in the usual case, and that the grant should be permitted to remain in effect, only where it is highly improbable that the protest will be successful.

I. THE COMMISSION ERRED IN CONCLUDING THAT APPELLANTS HAD NOT MADE A PRIMA FACIE CASE THAT THE GRANT TO TELRAD WAS NOT IN THE PUBLIC INTEREST.

The essential question raised by Appellant's Protest (R. 44-69) was whether the Telrad proposal would result in converting a Daytona Beach television station into an Orlando television station, and whether the public interest would be served by such a change. It was specifically alleged that the proposal by Telrad to move Station WESH-TV, which up to now has been located in Daytona Beach, Florida, toward Orlando, Florida, was made so that the station could become an Orlando market station and an outlet, in the Orlando market, for the television network of the National Broadcasting Company.

Daytona Beach is 51 miles from Orlando, Florida. The Commission's Table of Assignments, which appears in Section 3.606 of its Rules and Regulations, 47 C. F. R. 3.606, assigns Channels 2 and 53 to Daytona Beach, and Channels 6, 9, 18, 24, and 47 to Orlando. That Table was devised pursuant to the mandate of Section 307 (b) of the Communications Act which requires that there be equitable distribution of television facilities among the various communities in the United States. See Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24. The assignment of separate channels to the two communities in itself constitutes recognition by the Com-

mission that the two communities are completely separate and independent, with their own unique needs for local television transmission facilities. Indeed, in the 6th Report and Order of the Commission in Docket No. 8736, in which the Table of Assignments was adopted, (Vol. I, Part III, Pike & Fisher, Radio Regulation) par. 779, 818, the Commission insisted on retaining Channel 2 for Daytona Beach in preference to both Tallahassee and Orlando.

The Telrad proposal would effectively deprive Daytona Beach of its only VHF television assignment, and, as a practical matter, result in the addition of a 3rd VHF station for Orlando. This is not to say that the Telrad Station would not continue to provide a good viewable television signal for the residents of Daytona Beach. But the Commission has been gravely concerned not only with the availability of a viewable signal but with the provision for communities of substantial size of local broadcast facilities which will fulfill their needs as a transmission outlet. See, e. g., Federal Communications Commission v. Allentown Broadcasting Corp. 349 U.S. 358 (1955).

Orlando is the larger and more important city of the two. Daytona Beach is a city of 30,000 population whereas Orlando is a city of 52,000 population and part of a standard metropolitan area with a population of 115,000. Because of its size and importance, the national networks desire to have television affiliates located in Orlando. At the time of the Protest the comparative hearing on the two applications for the last remaining VHF Channel in Orlando had not been decided by the Commission and there was therefore no regular television affiliate of the National Broadcasting Company in that community.¹⁰ In seeking to move its station from Daytona Beach towards Orlando, Telrad represented to the Commission that it would obtain the National Broadcasting Company affiliation in that area. It was alleged in the Protest

¹⁰ Orlando Broadcasting Co., Inc. originally an applicant in this proceeding was the licensee of a VHF television station in Orlando which is a basic affiliate of the Columbia Broadcasting System, but presented some programs supplied by the National Broadcasting Company. As has been pointed out above, Appellant Mid-Florida Television has since been awarded the construction permit.

that the effect of such a move would be to have serious consequences upon the nature of the programming as well as the technical service, which would be rendered by Telrad's station. The net effect would generally be to duplicate the type of service which would be available from the other Orlando television station and to deprive Daytona Beach and area to the north of that city of the television service which it was contemplated, under the television allocation plan, should be provided by a bona fide Daytona Beach television station.

All of the issues which the Commission has designated for hearing in granting the protest of Appellants (R. 147) are related to the aforementioned question. Nevertheless, the Commission has held that the Appellants have not made a prima facie case that the grant to Telrad was not in the public interest. The Commission did not explain the basis for this conclusion, and it is consequently not clear exactly what the Commission meant by this determination. It could have either of two conceivable bases. The Commission could have concluded that even if the facts alleged by Appellants are true, no serious question with respect to the public interest is thereby raised. Or, the Commission may have concluded that the factual support adduced for the allegations of the protest were insufficient to establish the likelihood that the allegations could be proved at a hearing. Regardless of which was the basis for the Commission's determination, that determination was erroneous.

Indeed, the error of the Commission's determination, insofar as both possible bases therefor are concerned, is fully demonstrated by the prior action of the Commission with respect to the original proposal of Telrad to shift its station from Daytona Beach towards Orlando. When, under its former ownership Telrad sought to effect virtually the same changes as those now approved by the Commission, the Commission determined that a sufficient question was raised, respecting the public interest, to preclude a finding that the grant would

be in the public interest; it found that it would be necessary to hold a hearing on the application in accordance with the provisions of Section 309 (a) and (b) of the Communications Act. The original Telrad proposal did not differ from the present one in any significant respect. Nevertheless, when the Commission considered the earlier proposal in Mid-1955, it wrote to Telrad (Reference No. 8843, BMPCT-2846):

It appears from your application that you propose to move your transmitter site from a location one-half mile north of Daytona Beach to a location approximately 22 miles from Daytona Beach and 25 miles from Orlando; to increase antenna height above average terrain from 320 feet to 950 feet; to increase visual effective radiated power from 1.26 KW to 100 KW; and to make various equipment changes. It appears further that operation from your proposed location with the facilities specified in your application would result in a Grade A signal covering all of Orlando and in a principal city signal covering a portion of said city. In view of these facts, it appears that your proposed operation may result primarily in an additional service to Orlando rather than in service to the areas surrounding Daytona Beach. A question is thus raised as to whether, in fact, your proposed operation is designed to serve the particular needs of Daytona Beach and its surrounding areas. * * * *

In view of the foregoing, the Commission is unable to find on the basis of the information before it that a grant of your application would be in the public interest. Accordingly, said application must be designated for hearing.

Since at the time the Commission wrote the above quoted letter it had before it only the application of Telrad and general objections thereto filed by the licensee of Orlando broadcast stations (similar to those which were before it in the instant case), it is clear that that determination was reached without any greater factual support than was presented to the Commission in Appellants' protest to the instant Telrad application. Indeed, the instant protest contains infinitely more specific factual information than did the informal protest filed to the original application. It should further be noted that the Commission

found no lack of specificity in the allegations of the instant protest. On the contrary, it expressly found that with respect to the allegations concerning the intention to create an Orlando rather than a Daytona Beach station of Station WESH-TV, the protestants "have specified with particularity, within the meaning of Section 309(c) sufficient facts upon which they rely in support of the protest, * * * *" (R. 145).

The Commission's letter, quoted above, also establishes beyond doubt that a serious public interest question is raised by any attempt to deprive Daytona Beach of its only VHF television station and to add an additional service to Orlando. No language could be clearer than that employed by the Commission in August, 1955 stating that it could not find that a grant of the Telrad application would be in the public interest since there was a question raised as to whether the proposed operation was designed to serve the particular needs of Daytona Beach and its surrounding areas. The essential question presented in the protest hearing now being conducted by the Commission is whether such an intention is in fact held by Telrad or whether the effect of the move is to deprive Daytona of its own service.

The Commission has for a long time been struggling with the problem of television stations seeking to change the character of their assignments by moving from one city to another. The question in this case is, therefore, not a novel one and a sufficient body of precedent has been established to make clear that changes in assignment will not be permitted where to do so would frustrate the purposes of the television Table of Assignments. There is now outstanding an initial decision by an Examiner, in a case designated for hearing by the Commission, looking toward a denial of an application to move a transmitter site under circumstances similar to those presented here. Deep South Broadcasting Company, 14 R.R. 1001; see also a prehearing letter from the Commission in a case involving the move of a transmitter site from Manchester, New Hampshire towards Boston, Massachusetts, in which

the Commission has expressed the opinion that such a move would be contrary to the public interest, cited in the Protest filed in the instant proceedings. (R. 50). Further, in a case involving a somewhat different type of move of a transmitter site, Gulf Television Company, 12 R.R. 447, aff'd, 240 F 2d 409, the Commission, only after a lengthy hearing, and with a divided Commission, permitted the move in transmitter site. Accordingly, there is no question but that a move of this character by Station WESH-TV, under prior Commission precedent, raises most substantial questions.

The complete lack of basis for the Commission's determination in this respect in the present case was drastically demonstrated by the Opposition filed by the Commission to the Petition for Stay in the present action. The Commission there relied, in distinguishing its prior action on the original Telrad application, on two facts: (1) that Telrad's station was not on the air then and it is now; and (2) that Telrad has now submitted a detailed showing with respect to its present and proposed programming which shows its continuing interest in providing service especially directed to the needs of Daytona Beach and the surrounding area, whereas originally there were not adequate representations with respect to the orientation of the station's proposed program service to meet the special needs of the Daytona Beach area.

The fact that Telrad's station has actually been on the air cannot serve to distinguish the two situations. Obviously, when the original construction permit for the station was granted, it was done on the basis of the proposal to serve the needs of Daytona Beach and the surrounding area. The mere fact that when the original Telrad proposal to move the station was made, the station had not actually commenced operating, was no reason for the Commission to presume that the original promises of Telrad would not be fulfilled.

With respect to the nature of the showing made by Telrad in the present application with respect to its present and proposed programming,

the Commission is just wrong. The present application for modification of construction permit (R. 3B-29) does not even contain a filled-out Section IV (the section of the application devoted to present and proposed programming). No detailed showing either of present or proposed programming is contained in the application which the Commission granted. The only reference to programming is a paragraph typed on the back of Page 1 of Section I of the application (R. 4A), which states in the most general terms that no substantial change in program service is proposed from that set forth in the application for transfer of control of Telrad to its present owners, and that with a more centrally located transmitter the station will be unable to provide local and network service throughout all of the county in which Daytona Beach is located. Since the transmitter will be located closer to the county seat, an auxiliary studio at the proposed transmitter was also proposed. It is nothing but wild exaggeration to suggest that this is a "detailed showing with respect to both [Telrad's] present and proposed programming showing its continuing interest in providing service especially directed to the needs of Daytona Beach and Volusia County", as the Commission stated in its Opposition to the Petition for Stay (p. 13).

There is, in fact, no distinction between the facts presented to the Commission in the original Telrad application and those presented in the application which is the subject of this proceeding. Because of this, it is clear that appellants did present a prima facie case that a serious public interest question was raised by the instant Telrad application. If some new reason now existed for reaching a different result, it was incumbent upon the Commission to state the basis for its change of view. This, it did not do. Even if it could be assumed that the suggestions of the Commission in the Opposition to the Petition for Stay Order were accurate, those suggestions could not serve as the basis for affirming the Commission's action. Here, just as in The Radio Station KFH Co. v. Federal Communications Commission, Case No. 13272, decided in this Court on June 27, 1957, " * * * the record

does not make it clear that this was the theory on which the Commission * * * * based its determination to refuse to stay the grant to Telrad. In the KFH case, the Commission, in a comparative television proceeding, had denied rehearing and leave to show that in the first months of operation the successful application had failed to perform what it had promised, and Commission counsel argued that this was because only an interim operation was involved. This Court remanded the case to the Commission for clarification of its ruling in this respect, since the record did not indicate that the theory advanced by Commission counsel was the one actually relied on by the Commission. This case is completely analogous. However, in this case it has been demonstrated that if the theory suggested was in fact the one relied on by the Commission, it was erroneous and requires reversal of the order under review.¹¹

There is another reason why the Commission's determination that a prima facie case has not been made out by the appellants constitutes reversible error. This involves the two issues concerning whether the needs of the populations and areas north of Daytona Beach, which presently receive no Grade A television signal, should be subverted to the needs of the populations and areas to the south of Daytona Beach, which will receive a second Grade A signal as the result of the shift proposed by Telrad, and a third when Mid-Florida Television goes on the air. The factual basis for these issues is the availability of a

¹¹ It should be noted because of Telrad's failure to make a proper program showing the protest contained allegations that Telrad had failed to make full and frank disclosure of its programming plans and with respect to all of the facts and circumstances surrounding the filing of the instant application with particular reference to the negotiations, agreements and understandings with networks regarding a network affiliation and the utilization of the proposed Telrad facilities. These allegations were made the subject of issues on which the present protest hearing is being held. It requests no citations of authority to establish that the character of the applicant as manifested by its lack of candor in dealing with the Commission is a subject which bears directly on the public interest, and that if these allegations are proved at the hearing, the grant will have to be set aside. The Commission has suggested no reason why the prima facie case in this respect has not been made by appellants.

transmitter site to the north, rather than to the south of Daytona Beach, from which, it is alleged by appellants, superior service could be rendered to those areas and populations north of Daytona Beach. In its original Order granting the protest and refusing to stay the grant, the Commission rejected those issues because of its view that such a comparison finds "no basis in the Communications Act, or Rules or in past decisions"(R. 145).

This assertion was completely erroneous. In the Versluis case, 9 RR 1123, the Commission designated a Protest case for hearing on that identical question. See also Grand Haven Broadcasting Co. 4 RR 1313, 1322 c. As a result of the issuance of a Stay Order by this Court, the Commission reconsidered its determination, and designated for oral argument the legal and policy questions presented by those issues. The Commission's order designating the oral argument, issued in response to pleadings filed by Telrad, the Commission's Broadcast Bureau and the appellants. In seeking the designation of these issues for hearing, the Broadcast Bureau stated: (R. 151).

Inasmuch as the protestants urged upon the Court that the error in failing to afford them at least oral argument on the two noted issues affect the public interest determination on the question of postponing the effective date of the grant, we believe that the Commission (irrespective of which of the suggested procedures it may decide to adopt) should expressly decide whether the inclusion of these issues either in the evidentiary hearing or in an oral argument in any way affects its previous action refusing to stay construction. (Emphasis added)

The Commission did not in any way address itself to this question in the order designating the issues for oral argument. The Commission's original refusal to accept the two issues was based not upon a tentative determination that the appellants could not succeed with respect to them, but upon a legal interpretation that the issues were without the scope of the Commission's legislative jurisdiction. This view has obviously

been abandoned by the Commission. But the Commission has never considered the question of the likelihood of appellants' success. Without such a determination with respect to these two issues, the Commission's overall decision that the grant should not be stayed cannot be sustained. At the very least the Commission should be required to consider and express itself with respect to the effect on the public interest of the possible inclusion of these two issues in the protest hearing.

**II. THE COMMISSION ERRED IN CONCLUDING
THAT THERE IS A SIGNIFICANT NEED FOR
THE SERVICE PROPOSED TO BE RENDERED
BY TELRAD.**

One of the bases for the Commission's determination to refuse to stay the grant to Telrad was that Telrad would from its proposed site bring a "first or second service to a large number of people" (R. 146). Clearly, if the Commission had not reached this conclusion, it would have been required to stay the grant to Telrad. However, the conclusion was erroneous, and constitutes reversible error, for two reasons: (1) the Commission refused to consider facts brought to its attention which demonstrate the conclusion to be factually erroneous; and (2) because the conclusion is not supported by the record.

The allegations with respect to the number of persons who would receive a first television service as the result of the proposed shift by Telrad were brought to the Commission's attention by Telrad itself in its Opposition to the appellants' protest (R. 88-91). An engineering affidavit was submitted by Telrad showing, on the basis of the Commission's theoretical propagation curves, that 25,000 persons would

receive a first Grade B television service from the new Telrad operation (R. 115-28).¹² Undoubtedly the existence of this substantial "white area" (an area presently receiving no television service) would constitute a strong justification for allowing Telrad to provide service during the pendency of the protest hearing.

The showing made by Telrad in this respect was a purely theoretical one, based solely on the Commission's propagation curves which admittedly provide general statistical averages which may not be accurate as applied in any individual case. It is recognized that this Court has held that the contours determined by reliance on the Commission's propagation curves may be relied on to demonstrate television service, unless it can be shown that the predictions based on the curves are inaccurate in a specific case. Hall v. Federal Communications Commission, 237 F. 2d 567.

In their reply to the Opposition of Telrad (R. 129-141), the appellants adduced just such proof. It was alleged by appellants that actual television service in the area here considered far exceeds the theoretical predictions based on the Commission's propagation curves. This allegation was supported by a showing that in the very area where Telrad claimed that no service was presented, there were a very high proportion of television receivers. In each of the counties which comprise the alleged "white area", over 30% of the households have television receivers. It could not, therefore, be validly asserted that television service is not presently available to that area.

¹² Telrad also urged that a large number of people would receive a first service of higher quality than they are now receiving, and a choice of network programs as a result of its proposal. However, the provision of a higher grade of service could hardly suffice to sustain a refusal of a stay which is clearly contemplated by Section 309(c) of the Communications Act except in the most unusual circumstances (see Point III, *infra*). It is respectfully urged that if the new Telrad operation is not required to provide a first service to a significant number of persons, the Commission's determination in this respect was clearly erroneous. Consequently the discussion set forth in this Point will be directed solely at the alleged existence of a substantial number of persons who would receive their first television service as the result of the Telrad proposal.

This showing did establish the abnormality of the area involved. It was certainly a sufficient showing to require serious consideration by the Commission, and reference by the Commission to other materials contained in its other files bearing upon the propagation characteristics in the area involved.¹³

There can be no question but that when a substantial number of persons in an area own television sets, they were purchased for only one reason - to receive service from existing television stations. The existence of such receivers in the area claimed by Telrad to be without service placed a burden upon both Telrad and the Commission (if it wished to leave the Telrad grant in effect) to establish, if it is true, that the Commission's propagation curves are accurate as applied to this particular area, and that there is no service in the area involved.

But the Commission, in the Order under review, made no reference whatsoever to the showing made by Appellants or the evidence it submitted. There is no reference in that Order for the existence of many television sets in the so-called "white area." There is no indication in the Order that the Commission feels, as urged in its Opposition to Petition for Stay Order, that service of less than Grade B signal intensity is not worth considering. There is certainly no indication that the Commission even believes that such a large number of sets would have been purchased to receive signals of less than Grade B intensity. Here again, the argument of the Commission to this Court must be rejected as an explanation for its action because that argument does not necessarily represent the thinking of the Commission in the Order under review. Even if the Commission would, as a matter of policy, hold that service of less than Grade B intensity is insufficient

¹³ The Commission's curves are based upon average terrain while Florida has a very flat terrain. The Commission has received evidence of actual measurements of the propagation of television signals in Florida, which demonstrate that service in that area far exceeds that predicted by the standard propagation curves.

to serve the needs of any area, the Commission has not explained whether the existence of sets in the area results from the presence of a Grade B signal or from the desire of potential viewers to see television, even if the signal is of below Grade B quality. The Commission's view on this question must be clarified before its decision can be affirmed.

Speculation concerning the Commission's treatment of the evidence adduced by appellants is, however, more than generous. For a casual reading of the Order here under review demonstrates that the Commission never considered that evidence at all. Only such a failure to consider the evidence would account for the total lack of any explanation by the Commission of its significance, particularly where, as has been demonstrated, the evidence was of great enough significance to cast serious doubt on the Commission's ultimate determination. Footnote 1 of the Order under review (R. 142) cavalierly summarizes the reply of appellants, in which this evidence was contained, as follows:

Protestant's reply, in substance, consists of a general denial of the matters alleged by Telrad, Inc. in its Opposition.

One may legitimately wonder whether the Reply was ever read with enough care to understand it. The statement, of course, is an inaccurate description of the reply which contained entirely new matter bearing upon the existence of television service throughout the entire area proposed to be served by Telrad, a matter raised by Telrad in its opposition for the first time.¹⁴

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Indeed, the reply contained a specific rejoinder to matters of law as well as matters of fact. It was appellant's reply which contained the principal argument concerning the two issues, the disposition of which apparently led this Court to issue a stay order of the Commission's grant to Telrad.

III. THE COMMISSION MISINTERPRETED THE
REQUIREMENTS OF SECTION 309 (c) IN
DECIDING TO REFUSE TO STAY THE
GRANT TO TELRAD.

It has been demonstrated in Points I and II, supra, that the express bases for the Commission's determination were each inaccurate - that there was a prima facie case presented by appellant, and that there is no significant need for the service proposed to be rendered by Telrad. However, even if appellants were incorrect in these contentions, it would be necessary that this case be remanded to the Commission because the Commission erred in holding that a prima facie case must be presented and the existence of a "white area" negated before a protested grant will be stayed. The Commission has applied the wrong standard in deciding whether the Telrad grant should be stayed, and the application of the proper standard to the facts, even as found by the Commission, would undoubtedly result in the issuance of such a stay.

Section 309 (c) of the Communications Act provides extraordinary relief for parties in interest who attack the validity of an action taken by the Commission without a hearing. Section 309 (c) provides that where a protest is granted the effective date of the action protested shall be postponed until after the protest hearing, " * * * unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds, for reasons set forth in the decision that the public interest requires that the grant remain in effect, * * * ". The question presented in the present case is what public interest requirement must be found for the Commission to allow the grant to remain in effect. Obviously this public interest standard is not the same as the one which led the Commission to make the grant in the first place. For if that were the case, no grant would ever be stayed during the pendency of a protest hearing.

Without extensively detailing the legislative history of Section 309 (c)(which has been presented to this Court upon numerous occasions), it is sufficient to note that the section was enacted because of Congressional dissatisfaction with the inquiry made by the Commission into considerations involving the public interest in connection with its administration of the Communications Act. In order to provide for a full exploration of the public interest considerations involved in Commission action, Congress provided that while a protest hearing was being conducted, the Commission action, whose validity was under consideration, should be automatically stayed. Obviously this resulted from Congressional fear that the hearing provided for in Section 309 (c) would be an empty gesture if the construction contemplated by a grant were completed before the hearing on the grant was terminated.

As originally enacted, Section 309 (c) provided that every protested action must be stayed " * * * unless the authorization involved is necessary to the maintenance or conduct of an existing service * * *". Because of the stringent nature of this stay provision, the Commission repeatedly sought enactment thereof. And, in 1956, Section 309 (c) was in fact amended to read as set forth, supra. The amendment did not change the basic character or purpose of the protest section. More important, it did not change the legislative attitude that the hearings contemplated by this section would be vitiated if construction of the facilities under attack was completed before the hearing terminated.

Congress did liberalize to a very limited extent the requirement for an automatic stay. It provided that where unusual public interest considerations required, the authorization in question could remain in effect during the pendency of the protest hearing. But in thus liberalizing the statute, Congress expressly provided that the discretion afforded to the Commission was a "limited discretion".

The burden with respect to a stay was not placed upon the protestants. It was placed squarely upon those urging that the stay

should be refused. The very statement of Congress on which the Commission relied in the order here under review (R. 146) unequivocally defines the limited nature of discretion given the Commission by the most recent amendment (Senate Report accompanying S. Rep. No. 1231, 84th Cong., 1st Sess. on H.R. 5614, 1 Pike & Fischer Radio Regulations 10:373):

Secondly, section 309(c) as amended by this bill (H. R. 5614) would permit the Commission, even where it is necessary to hold a full evidentiary hearing, to continue the protested grant in effect if the Commission affirmatively finds that the public interest so requires and sets forth the reasons for its determination in its decision. The Committee believes it is necessary and appropriate that the Commission be given this limited discretion. It must be recognized that there will be cases where protestants will plead facts to which the Commission cannot demur, although, on the basis of all of the facts available, it is clear that the likelihood is extremely remote that the protested grant will ultimately have to be set aside. In such circumstances, the Commission should not be precluded from considering whether the public interest requires the protested authorization to remain in effect, but the Commission must affirmatively find and set forth reasons in its decisions as to why the public interest requires the grant to remain in effect.

The committee is well aware of the very real inconvenience to the public which would result if a protested grant is permitted to stay in effect and it is ultimately determined that the grant must be set aside and the service terminated. However, in exercising its limited discretion to continue a protested authorization in effect, the Commission would have to consider not only the need for the new service in question, but also the likelihood that the grant in question would ultimately have to be set aside. The committee feels that these requirements will minimize the possibility of the public being deprived of a service on which it has come to rely. In any event, we do not believe that, to insure against the remote possibility that an operating service may have to be taken off the air, it is necessary or advisable to preclude any operation by a station pending a protest hearing regardless of any countervailing public interest considerations.

It is clear from this statement that Congress added the new exception to the stay requirements of Section 309 (c) in order to provide for cases in which, although the Commission cannot demur to the allegations of the protestant, the likelihood that the protested grant will ultimately have to be set aside is extremely remote. The tenor of the statement as a whole is clearly that only in the most unusual circumstances should a stay be refused.

The Commission, in the order under review, has not found that the likelihood of Appellant's success in the protest hearing is "extremely remote". Indeed, it could not so find on the basis of the record before it. It is respectfully urged that if the error of the basic standard applied by the Commission is pointed out to it by this Court, the Commission will on remand reach a contrary result on the basis of the record presented to it. In its Opposition to appellants' Petition for Stay Order, the Commission urged that no consideration of the merits of Appellants' protest was required by Section 309 (c), and that the Commission determination with respect to the need for the new service was sufficient, standing alone, to justify the Commission's determination. We believe, as has been shown, that this position is unsupportable, in view of the language and legislative history of Section 309 (c). Moreover, it must be noted that the Commission did not adopt this view in the order under review. The Commission's interpretation of the meaning of Section 309 (c) coincides, in this one respect, with that of appellants. The Commission must be given an opportunity to correct its determination in the light of its own interpretation of the requirements of the section, as corrected by the mandate of this Court. See Smith v. Federal Communications Commission, Case No. 13571, decided June 21, 1957.

CONCLUSION

For the foregoing reasons, the order of the Commission here under review should be reversed and the case remanded for further proceedings in accordance with the judgment of this Court.

Respectfully submitted,

LEONARD H. MARKS,
PAUL DOBIN,
STANLEY ^{S.} NEUSTADT

317 Cafritz Building
Washington 6, D. C.

Attorneys for Appellants

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